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THE

LAW OF LIBEL:

IN WHICH IS CONTAINED

A GENERAL HISTORY OF THIS LAW

IN THE ANCIENT CODES,

AND

OF ITS INTRODUCTION, AND SUCCESSIVE ALTERATIONS,

In the Law of England.

COMPREHENDING

A DIGEST

OF

ALL THE LEADING CASES UPON LIBELS,

FROM THE EARLIEST TO THE PRESENT TIME.

BY

FRANCIS LUDLOW HOLT, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

SECOND EDITION,

WITH CONSIDERABLE ADDITIONS.

Eadem famæ quam vitæ est habenda ratio, fama vitaque hominis iisdem legibus nituntur.

JURIS CONS. EXCERPT APUD DIG GOTHOFRED. ED.

London:

PRINTED FOR J. BUTTERWORTH AND SON, LAW BOOKSELLERS, FLEET STREET, AND J. COOKE, ORMOND QUAY, DUBLIN.

1816.

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Printed by J. BELL, Clare-court, Drury-lane.

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TO

THE RIGHT HONOURABLE

EDWARD LORD ELLENBOROUGH,

LORD CHIEF JUSTICE OF ENGLAND,

&c. &c.

My Lord,

As the design of the following Treatise is to explain a very material part of the Criminal Law of the Land, it naturally suggested itself to me, that your Lordship, as being at the head of that Law, had a kind of onus attached to your office, and personal eminence, of becoming the refuge of all such attempts.

My Lord, it has been my effort to point out the conformity of the doctrine and practice of the Law of Libel with the acknowledged Common Law of the Land; to shew that this Law has very few peculiarities, and that these peculiarities are rather necessary properties of the nature of the subject, than arbitrary deviations from the general principles of the law.—This is another reason, therefore, why the present publication naturally betakes itself to your Lordship.—To whom can the Law of the Land so

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suitably appeal, as to its firm and eloquent supporter? To whom is there so natural a refuge for principles and precedents, approved by the experience of so many centuries, against new opinions and fancies, as to the disciple of Paley?

My Lord,

I have the honour to be,

With the highest respect,

Your Lordship's most obedient Servant,

FRANCIS LUDLOW HOLT.

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PREFACE

In the present Edition of the Law of Libels, the Author has altered the arrangement in some material parts. These changes have been made for the sake of a clearer distribution, and in order to bring together those parts of the treatise which, having suggested themselves in the course of the work, had been disposed rather according to their incidental occurrence, than referred to the heads to which they properly belonged.

The cases cited in the course of the work have been thrown into notes, and the text, as containing the principles, has been considerably enlarged. The popular and more specious objections to the Law of Libel are, for the most part, summed up in the First Book. Upon the whole, the Author presumes to flatter himself, that in the present edition a more just relation and dependency of the parts has been preserved throughout.

In the Chapter on libels against the two Houses of Parliament, the Author has examined at greater length the jurisdiction and practice of Parliament in punishing

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libels in a summary manner. In this part of the treatise he trusts that he has not impertinently employed himself, in endeavouring to define the nature and limits of PRIVILEGE, and to form the cases, as they affect the question of libel, into a kind of system.

Although the Author feels a just pride in the reception of the present work both with the public and the profession, he deems it necessary to correct a misapprehension into which some of the popular criticisms have fallen in the consideration of the subject matter. They have observed upon it as if the Author had produced a system of the law of libel of his own—He had no such purpose—His design was to explain, as far as his own conceptions went, the law of England as it related to libel, and he has advanced nothing but what appears to him to follow from all the adjudged cases on this subject.

It is indeed in the very nature of his subject, that it is extremely difficult to clear it of those popular conceits, and of that vagueness of generality, which adhere to it as a question of frequent political discussion. The law of libel has been for a long time rather a theme of declamation than a topic of legal argument.—The subject, indeed, lies so near the confines where politics encroach upon the science of law, that it is difficult to avoid stepping from one to the other; and the learning upon this question, if any it could be

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called, had so strayed into pamphlets and popular harangues, that all the precision of a legal subject was lost in the loosest generalities.

Undoubtedly there is no question more important to Englishmen than that which relates to the liberty of the press; and therein to the free use of an instrument which, by diffusing argument and opinion, extends the sphere of discussion from individuals to society.—But this very extension obviously renders it as dangerous in its abuse as it is useful within proper control.

Under the suitable restrictions of religion, morality, and law, the liberty of the press assists the true interests of all.—It preserves religion from bigotry, defines, distributes, and enforces morality, and without forgetting what is due to the magistrate and to public order, it controls, by a gentle superintendence, the administration of law itself.

4, *Essex-court, Middle Temple,*
April 22, 1816.

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THE

LAW OF LIBELS.

BOOK I.

CHAP. I.

HISTORICAL DEDUCTION OF THE LAW OF LIBELS.

All laws which relate to the absolute rights of persons have their foundation in the law of nature, or human reason; the magistrate doing little more than publishing them anew, and, by reason of their civil effects, annexing human penalties to moral duties. It is the perfection of legislation to comprehend as much as possible of this natural equity and right reason, and it is the distinction of the common law of England, rather by a concurrence of accidents than original design, that it has drawn more copiously from these sources than any other system of jurisprudence now in use.

The civil law was necessarily deficient, inasmuch as the morality of Paganism was defective and depraved; it was not a law of liberty, nor a law of correct charity; it wanted that Christian spirit which purified every system into which it entered. It did not want, however, in almost absolute perfection, all the rules of justice. It settled with the most admirable accuracy and subtilty all the dimensions of moral substances, and all the circumstances of civil rights and duties; it applied the elaborate logic, or rather ontology, of the

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peripatetic philosophy, to classify every possible mode and combination of right and wrong[a]. Hence, in the vast stock of possible actions in civil society, scarcely any thing was unforeseen and unprovided with its remedy; scarcely any thing which had not its assigned equity and legal proportion. Here, however, its excellence ended; it looked not beyond human reason for its source[b]. The common law of England in this respect has obtained an infinite advantage. It rose, for the most part, in better times, and from a

[a] Examples of this subtilty may be found in every part of the Digest, more particularly amongst the commentators on the second book of the Institutes. See titles *de specie ex aliena materia facta; de alluvione; accessione, &c.*

[b] There are many titles in the civil law asserting rights and principles from which our more correct notions of duty avert. The four following are the principal:—1*st*. The Patria potestas, so much the characteristic of the Romans as to constitute one of their distinguishing epithets as a people,

"Dum domus Æneæ Capitoli immobile saxum
"Accolet, imperiumque *Pater Romanus* habebit."
Æn. ix. 449.

It is unnecessary to enumerate cases in which this family dominion passed into such tyranny, that the Emperors found it necessary, gradually and indirectly, to abolish it.

2*d*. The right of the master over the servant, founded on the erroneous notion that the conqueror had acquired a right over the life of his captive, and that therefore he might commute it for his personal services.

"Vendere cum possis captivum, occidere noli."
Hor. Epist.

3*d*. In the indulgence and express recognition of concubinage till abolished by the Christian Emperors; in the toleration of some of the grossest vices and impurities, and regarding them in the rank of human infirmities and ordinary passions; in many of the punishments; and in most of the notions of crimes.

4*th*. The whole of the jus belli, or right of conquest, falls under the same imputation.

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purer spring and bed. Its fabric indeed was half finished when its foundation was laid in Christianity. This rectified its reason, and gave that line and rule for the structure of our common law, by keeping their eye upon which through every successive layer, the builders have carried it erect and perpendicular to its present height.

In the following pages it is our purpose to inquire what the common law has declared with respect to those rights of personal security which apply to character and reputation.—The character of individuals is unquestionably one of their absolute and personal rights. It is therefore unnecessary to make any distinct affirmation that the protection of it most immediately falls within the common law. Reputation, indeed, is not only one of our perfect rights, but that which alone gives a value to all our other rights; the integrity of our honour and character being one of the chief instruments of temporal prosperity and success.

It will assist in our examination to take a preliminary review of the codes of those legislators, who, in the infancy of society, united the offices of religious, moral, and legal teachers.

Amongst the Jews, to whom a distinct revelation was made, one of the main purposes of which was to revive the characters of the law of nature, and to retrace those lines which were defaced, and almost obliterated, by corrupt traditions, to slander any one, particularly those in authority, was expressly forbidden by the law of Moses. Exodus, chap. 22, 23. The Persians had a law which declared it infamous to be

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detected in a lie. A people, enacting positive law in mere morals, could not be unprovided with a punishment for defamation[c]. The laws of Solon, which embraced morals as well as civil duties, extended in a most direct aim to calumny. Whoever, says that legislator, shall calumniate any man while alive, in the temples, courts of law, treasuries, or where games are celebrated, shall pay three drachms to the injured man, and two to the public treasury. In the life of Solon, Plutarch adverts to the same law.—" He shall be fined who slanders any man."

This law is alluded to by Lycias in his oration in Theomnestem. Isocrates, in Lochitem, quotes another law of Solon. He shall incur a fine of 500 drachms, who reproaches any one with a heinous offence against the laws of his country.

1 Pet. Leg. Attica, 535.

The very different character of the Athenians and Lacedemonians has been imputed, with justice, to the very different tone of their laws. The laws of Solon had a sweetness and benevolence which passed into the manners of the Athenians, and, in the form of politeness, constituted their distinguishing feature. The Athenians were only the most polite people of Greece, inasmuch as they were the most social and benevolent[d].

Solon justly concluded that the liberty of the citizen would be imperfect unless his character were protected.

[c] Lord Coke mentions, we know not upon what authority, a law of the Lydians, by which the publishers and dispersers of slander were to be let blood in the tongue, and the listeners, and applauders, in the ear.—xii. Rep. 35.

[d] See the Epitaphius of Pericles, 2d lib. Thuc. in which he enumerates the popular traits of the Athenians.

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Hence the penalties denounced against libellers, and the permission to prosecute them by public accusation. Hence the prohibition of libelling the dead, as offending the piety of the living, and perpetuating the hatred of families.

Plutarch, in his life of Solon, commends this law; he has, however, quoted it partially; Solon punished the calumniator, not on account of injury to the dead, but in respect to the quiet of families and the public peace.

Ulpian adverts to this law, and according to Suidas it was the subject of public accusation. "Itaque veteres (says Pliny) ad mentionem defunctorum testabantur, memoriam eorum a se non solicitari[e]."

There are other laws of Solon directed against defamation, but as no penalties are annexed to them they are merely prohibitory. The orators of Athens were restrained in their public harangues, and subject to a fine for contumelious language. The Athenians had one law which was purely political. At Athens an action of slander was given against any one who disparaged another for belonging to a trade[f].

Trade at Athens was highly honourable, and we are

[e] Plutarch quotes this law as follows:—
Τον τεθνηκοτα μη κακως αγορευειν.—Demosthenes in Leptinea quotes the law.—
Μη λεγειν κακως τον τεθνηκοτα, μηδεν υπο των εκεινου εχθων ποιειν αυτος.—
Vide for other fragments of Athenian laws, Plutarch, vit Sol. Pet. Leg. Att. Meursius. Pott. Ant. Dagge's Crim. law.

[f] The laws against libels which involved the peace and honour of Athens were executed with great severity. Phidias, the celebrated sculptor, was prosecuted for a libel and thrown into prison, because he had represented on the shield of Minerva some circumstances which impeached the credit of the ancient history of Athens and of their founder Theseus.—Plutarch in Periclem.

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told by Plutarch, that Solon himself was engaged in merchandise[g].

With respect to the laws of Rome, in cases of defamation, there is some perplexity. In the dark age of the Decemviri, the author of libels and satires was punished with death; a law which these legislators did certainly not import from Greece. It was, perhaps, a part of the leges Regiæ which the Decemviri retained in their code[h].

As the manners of Rome were insensibly polished, and soon after the expulsion of the Decemviri, their laws fell into disuse. They were not formally repealed, but the humanity of the age stopt the mouth of the accusers. The Porcian and Valerian law took from the magistrate the power of inflicting death on a free citizen, or any corporal punishment; the laws of the Decemviri were thus indirectly repealed, and, perhaps, truly ascribed, not to the spirit of patrician, but of

[g] Lycias, in Theomnestem, quotes the following law as proceeding from Solon:—

Τον λεγοντα κακως, εαν μη αποφαιη ως εστιν αληθη τα ειρημενα, ζημιουσθαι.

[h] Si quis actitaverit, sive carmen condiderit, quod infamiam, flagitiumve alteri precetur, capite punitor.—This law is to be found in a fragment of the 4th Book of Cic. de Rep.—apud Augustinum, lib. 2. cap. 2. Scipio Africanus, who is introduced discoursing upon the licentiousness of the Greek Comedies, thus concludes: "Nostræ xii. tabulæ, cum perpaucas res capite sanxissent, in his hanc quoque sanciendam putaverunt, si quis carmen condidisset quod infamiam faceret, flagitiumve alteri precaretur.—Præclare, judicis enim ac magistratuum disceptationibus legitimis propositam vitam, non poetarum ingeniis habere debemus: nec probum audire nisi ea lege ut respondere liceat, et judicio defendere."—Horace alludes to this law in the well known lines.

—— Quin etiam lex—
Pœnaque lata, malo quæ nollet carmine quenquam
Describi, vertere modum formidine fustis—
Ad bene dicendum, delectandumque redacti.

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regal tyranny. It was to this early time of the republic, after the expulsion of the Decemviri, that we may refer what Livy says of the Romans, that no people were disposed to more moderation in their punishments. Liv. lib. 1.

Sylla, whose laws partook of the darkness of the age of the first Kings of Rome, followed the examples of early times in his laws against libellers.

Montesquieu, however, is not correct, when he charges Sylla with augmenting the punishment against libellers and satirists.

The Cornelian law decreed, that the convicted author Famosi Carminis should be deprived of the right of making a testament, or, as some understand it, should not be suffered to give evidence in a court of justice[i].

The laws of Sylla fell into disuse after his death, and, though in the days of Horace, a libeller might be deterred formidine fustis, it was deemed no great hazard in cases of private libel (for to offences of this kind against the state the laws læsæ majestatis applied) if the libeller could support the truth of his charge. To this Horace humorously alludes in his dialogue with Trebatius[k].

[i] Ulpian in the Digest thus cites the law. Si quis librum ad infamiam alicujus pertinentem scripserit, composuerit, ediderit, dolove malo fecerit quo quid eorum fieret, etiamsi alterius nomine ediderit, vel sine nomine, de eâ re injuriarum agere licere, et si condemnatus sit, qui id fecit, intestabilem ex lege esse jubere.

[k] Trebatius.—Sed tamen ut monitus caveas, ne forte negoti
Incutiat tibi quid sanctarum inscitia legum,
Si mala condiderit in quem quis carmina, jus est,
Judiciumque.

Horatius.—Esto, siquis mala, sed bona siquis
Judice, condiderit, laudatus Cæsare, si quis
Opprobriis dignum latraverit, integer ipse:

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Augustus in the latter part, and Tiberius through the whole of his reign, subjected satirical writers, in cases even of private calumny, to the same punishments as for offences against the laws læsæ majestatis[l]. The Cæsars were not, however, the first who extended these laws to libellers. Sylla, who confounded liberty and tyranny, decreed that it should thenceforward form a part of the laws læsæ majestatis to declaim against any public officers[m]. At the time of Cataline's conspiracy, and in the triumvirate of Octavius, Lepidus and Antony, this law of Sylla was obsolete and disregarded.

In the early age of the republic, the laws læsæ majestatis implied different crimes, namely, crimes against the state; the title of the law was indeed known in ancient times, but the spirit of it differed from the modern application. In the days of the republic, the treachery of a commander, the seditious spirit which threw the state into disorder, the corrupt administration which impaired the majesty of the Roman people, were the objects of this law. These were acts[n], and acts were punished, but words, says Tacitus, were free.

Trebatius.—Solventur risu tabulæ tu missus abibis.

The commentators are at variance upon the true meaning of this passage, Solventur risu tabulæ.—Some understand it, that the process is at an end, the court is closed.—May it not be thus interpreted :—Dissolventur risu judicum tabularum leges, tu missus abibis.—None of the commentators adopt this construction; but Acro, a celebrated critic and lawyer, whose opinion is often quoted by Godefroy in his commentary, seems to elect this construction in a manifest allusion to the present passage:—Ridebunt legem xii. Tab. de malis carminibus, tu missus abibis.

Tac. Ann. lib. 1.

[m] Veruntamen est majestatis, ut Sylla voluit, ne in quemvis impune declamare liceret.—Cic. Fam. Epist. 3. 11.

[n] Facta arguebantur, dicta impune erant.—Lib. 1st Ann.

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Augustus was the first who brought private libellers under the penalties of this wrested law, incensed by the licentious spirit of Cassius Severus, who had wantonly defamed the most illustrious characters of Rome. This law would probably have perished with the occasion but for the succession of Tiberius, who, on being asked by the Prætor if process should be granted upon this law of Augustus, replied, that the law against libellers must be executed. Hence may be seen, says Tacitus, how this grievous mischief crept in; how it was restrained, and how at length it blazed out and consumed every thing[o].

It is not necessary to take more than a cursory review of the progress of the law of libels from the reign of Augustus to that of Constantine. Under Titus and Vespasian the laws læsæ majestatis were brought back to their proper limits; and under Domitian they revived more terribly than ever[p].

[o] We read in Aulus Gellius that Nævius, the comic poet, was thrown into prison for certain defamatory verses in one of his plays, Aul. Gell. lib. 3d. c. 3.—Horace, and his cotemporaries, were afraid of the laws of the Twelve Tables.—Tiberius felt the lash of satire, as may be seen in the lampoon preserved by Suetonius in Tiberium, lib. 1. mo. 59.

[p] It is proper to observe, in this place, that a distinction was very early taken in the Roman law between slander spoken and written; and the injuria verbalis was deemed to constitute a much lower degree of injury that the malum carmen, and famosus libellus.—The jurists are unanimous in their interpretation of the laws against slander, that the truth of contumelious charges excused the speaker; in other words, according to the technical language of our law, that he might justify his charges, provided they were imputations of crimes falling under the cognizance of the ordinary tribunals. It is to this distinction, and a consideration of the security which the law necessarily extended to such as made charges with a view of bringing them into legal inquiry, that we must refer the famous response of Paulus, "Eum qui nocentem infamavit, non esse bonum

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In the Theodosian Code we find, for the first time, a distinct series of laws, entitled the four constitutions of Constantine de Famosis libellis. As these constitutions are said by a judicious writer to be the root of our own law against libels in the present day; to have been introduced by Sir Edward Coke into the Star Chamber; by him declared to be the resolutions of the Judges of that Court; and to have descended to us from that period as the language and rule of the common law with respect to libels, we shall consider these constitutions in some detail.

Barrington on the Statutes.

In the Theodosian Code they are called Quatuor Constitutiones Constantini de Famosis Libellis, though they include the rescripts of Valens, Valentius, and Valentian. The first is as follows :—

" Si quando famosi libelli reperiantur, nullas exinde calumnias, patiantur ii, quorum de factis vel nominibus aliquid continebunt, sed scriptoris auctor potius reperiatur, et, repertus, cum omni vigore cogatur, his de rebus, quas proponendas credidit, comprobare, nec tamen supplicio, etiamsi aliquid ostenderit, subtrahatur."

æquum ob eam rem condemnari, peccata enim nocentium nota et oportere et expedire." He adds, " Nulla scilicet est contumelia quæ fit dignis."—But if the charge, at the time of making it, were not cognizable by law, the crime being either satisfied by punishment, or excused by pardon; or, in case the reproach were of a corporal defect, or natural infirmity; under such circumstances, the truth was deemed rather to enhance than to palliate the injury, and the malignity of the speaker's mind was principally regarded.

" Sin autem quod objicitur innotescere nihil interest, puta, si alter pœnam delicti sui sustinuerit, aut in vitium naturale objiciatur, clandus aliquis, luscus, aut gibbosus vocetur, veritatem convicii non excusare, quo minus animo injuriandi id factum præsumatur; contrarii tamen probationem hic admittendam."—Vinn. Comm. in Inst. Just. Lib. 4, Tit. 4.

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This constitution points at libels containing charges against officers of the state, the authors of which could not be found. The design of the Emperor was to bring the accusers forward, and not to suffer them to disperse anonymous defamation.

Constantini Secunda Constitutio.—" Licet serventur in officio tuo, et vicarii, exemplaria libellorum, qui in Africa delati sunt, tamen eos, quorum nomina continent, metu absolutos securitate perfrui sinas, solumque moneas, ut ab omni non solum crimine, sed etiam verisimili alieni esse festinent.—Nam qui accusandi fiduciam gerit, oportet comprobare, nec occultare quæ sciverit, quoniam predicabilis erit ad dictationem publicam merito perventurus."

This constitution refers to libels already in the possession of his proconsul or his deputy, or to such as were transmitted anonymously to the magistrate. It relates to the various laws in the Digest, de criminis nunciatione magistratrui facta, of which mention is frequently made by Seneca, Pliny, and Tacitus. It appears, therefore, to be classed under a wrong title in the Theodosian Code, as one of the constitutions of Constantine de Famosis libellis.

Constitutio Tertia ad Januarium.—" Ut accusatoribus patientia præbenda est si quem in Judicio persequi volunt, ita famosis libellis fides habenda non est, nec super his ad nostram scientiam referendam cum eosdem libellos flammis protinus conducat aboleri, quorum auctor nullus existit."

Constitutio Quarta.—" Famosa scriptio libellorum quæ nomine accusatoris caret, minime examinanda est, sed penitus abolenda; nam qui accusationis pro-

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motione confidat, libera potius intentione, quam captiosa atque occulta conscriptione, alterius debet vitam in judicium devocare."

Constitutio Quinta ad Afros.—"Libellos, quos famosos vocant, si fieri possit, abolendos, inclytus pater noster providit, et hujusmodi libellos, ne in cognitionem quidem suam, vel publicam jussit admitti; non igitur vita cujusquam, non dignitas, concussa his machinis vacillabit; nam omnes hujusmodi libellos concremari decernimus."

Constitutio Sexta, ad Populum.—"Nemo prorsus de famosis libellis, qui neque apud me, neque in judicio, ullum obtinent locum, calumniam patiatur. Nam et innocens creditur cui defuit accusator, cum non defuerit inimicus."

It would be difficult to pass any judgment on these laws of Constantine which would not redound to the credit of his humanity and experience in the art of government.

To extinguish secret and anonymous libels, but, at the same time, not to impair those sources of information and charge, which were necessary to bring crimes to the notice of the public tribunals, seems to have been the aim of these laws. The laws cannot be duly executed unless a wide door be open to public accusation, and it is the policy of every wise code not to press upon public accusers the heavy responsibility of establishing, under all circumstances, the truth of their charges. The effect of the laws of Constantine is to call the libellers into court, to arm them with public accusations, and, by means of a legal inquiry, to administer an immediate remedy to their calumnies.

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In the Theodosian Code follow next the two constitutions of Valens, de Fam. libellis, in which nothing of interest is to be found[q].

Constitutio Nona.—Imp. Valentinianus, Theodosius, et Arcadius, Cynegio, P. P.

" Si quis famosum libellum, sive domi, sive in publico, vel in quocunque loco, ignarus offenderit, aut discerpat priusquam alter inveniat, aut nulli confitetur inventum; nemini denique, si tam curiosus sit, referat, quid legendo cognoverit. Nam quicunque obtulerit inventum, certum est ipsum reum ex lege retinendum, nisi prodiderit auctorem; nec evasurum pœnas hujusmodi criminibus constitutas, si proditus fuerit cuiquam retulisse quod legerit."

Theod. Cod. Lib. 9. Tit. 34[r].

It would be uncandid to the memory of Theodosius to omit one of his constitutions with respect to a crime of frequent occurrence in the present day.

Theodosii Constitutio de Maledictis in Principem, Ejusque Tempora Jactatis.—" Si quis modestiæ nescius, et pudoris ignarus, improbo, petulantique maledicto, nomina nostra crediderit lacessenda, ac temulentia turbulentus obtrectator temporum fuerit, eum pœnæ nolumus subjugari, neque durum aliquid, neque asperum sustinere: quoniam, si id ex

[q] We have an example of the hostility of the Emperor Valens against libellers, in his oration to the Senate of Constantinople, reported by Themistius. " Imperii morbum, says Valens, periculisiorem esse, cum subditi calumniatoribus subditi sunt, quam cum barbaris serviant."

[r] It appears to be this constitution which Sir Edward Coke informs us, was one of the resolutions of the Star Chamber, and which, together with many others, was moulded into those famous decisions in the case in his reports, entitled, super eminentiam, De Famosis Libellis.

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levitate processerit, contemnendum est; si ex insania miseratione dignissimum, si ab injuria remittendum[1]."

Such are the laws against libellers which are contained in the Theodosian code.

It is to be lamented that many excellent writers have misunderstood these laws, and considered them rather as effects and instruments of despotism, than benevolent and salutary provisions for the peace and security of the community. It may be seen almost in every page of the latter Roman writers, such as Pliny, Tacitus, and Seneca, that the courts of the Emperors were pestered with a set of men who solicited the imperial favour by an ostentatious zeal in accusing the most eminent characters in Rome. The punishment of the delatores of Nero, in the succeeding reign, is well known. The design, therefore, of most of the laws de libellis famosis was to prevent secret and ambiguous accusation; the severity was pointed against those who found, read, or circulated anonymous charges of crimes; it compelled every man to invest himself with his own accusation, and, to adopt a colloquial expression, to stand forth and prove his words.

In the Digest many laws are to be found, besides the Cornelian law, or senatus consultum, cited by Ulpian, inflicting punishment upon libellers. The general tenor of these laws seems to be, that the truth or falsehood of the charge was every where taken into account. If the subject of the defamation were of a nature which concerned the commonwealth, the libeller was absolved

[1] This constitution applies to words only: it was published, A. D. 393. See the Commentary on the Cod. Theod. Lib. 9. Tit. 34.

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if he could prove his accusation before a competent tribunal; a kind of option was allowed him to vindicate his charge by becoming an open accuser. The truth was not in the nature of a defence, or, what is called with us a justification in law, but it afforded him a refuge behind which to shelter himself, and, as it were, to compromise a breach of the public peace by standing forward to aid the execution of the more important laws of criminal justice.

If the defamatory matter respected some vice or infirmity, moral or natural, or even a crime, pardoned, or satisfied by punishment, the defamation, though true, was punished.

Justinian, in his Institutes, has classed libels and defamations amongst private injuries of the highest degree[t].

In the collection of the Roman laws under Justinian, which was the most perfect form which the civil law assumed, the constitutions of Constantine de famosis libellis were severed from the corpus juris civilis. But in the 9th book of the code, tit. 36. the following edict of the Emperors Valentinian and Valens is incorporated with the laws of Justinian.

" Si quis famosum libellum, sive domo, sive in publico: vel in quocunque loco, ignarus repererit, aut corrumpat prius quam alter inveniat, aut nulli confiteatur inventum. Si vero non statim easdem chartulas corruperit, vel igne consumpserit, sed earum vim mani-

[t] Injuria autem commititur, &c. &c. si cui convitium factum fuerit, &c. &c. vel si quis, ad infamiam alicujus, libellum aut carmen scripserit composuerit, ediderit, dolove malo fecerit, quo quid eorum fieret, lib. 4to. tit. 4to.

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festaverit, SCIAT se, quod auctorem hujusmodi delicti capitali sententiæ subjugandum. Sane, si quis devotionis suæ, ac salutis publicæ custodiam gerat, nomen suum profiteatur, et quæ per famosum libellum persequenda putaverit, ore proprio edicat, ita ut absque ulla trepidatione accedat, sciens quidem quod si adsertionibus suis veri fides fuerit opitulata, laudem maximam et præmium a nostra clementia consequetur; sin vero minime vera obstenderit, capitali pœna plectetur."

The term famosus libellus was almost exclusively given to that species of libel which affected the credit or tranquillity of the commonwealth. The design of this constitution, therefore, was to bring forward public accusers, and to destroy those ambulatory libels, or rather menaces, which injured the peace of families, and were probably the means of extortion amongst the delatores. This species of libel rather corresponded with the offence known in our laws by the title of threatening letters or threats to extort money. The severity against this species of libel must not be confounded with the civil law of libel understood according to the term of libel amongst us. This was not the famosum carmen or scripta injuria. It was that kind of crime which every community has justly considered as constituting a capital offence[u].

[u] Codex Justinianus, tit. 36. de famosis libellis.—" Famosis libellis, si quis scripserit quod pertineat ad injuriam alterius, de qua est publica accusatio, et pæna capitalis, non tantum in auctorem famosi libelli, sed etiam in eum qui invenit, nec combussit, sed evulgavit; quia iste auctor præsumitur esse libelli, qui eum sparsit in vulgus, non prodito auctore.— Vide Ajacii, Comm. in hoc loco.

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With respect to ordinary libels and contumelious words, the proceeding in the age of Justinian was either matter of public prosecution or private action. The laws of the twelve tables, and most of the Senatus Consulta de injuriis, were now become obsolete. The plaintiffs recovered in proportion to the measure of their injuries; and, according to Justinian, secundum gradum dignitatis, vitæque honestatem, crescit aut minuitur æstimatio injuriæ. Instit. Lib. 4. Tit. 4.

There is great difficulty in examining any branch of the civil law. Notwithstanding the care of Justinian, there is scarcely a title in the Pandects in which one positive and unalterable rule of judgment is laid down.

The subject, and every possible circumstance of it, are foreseen and provided for with a wonderful sagacity, but the rule has so many qualifications, and so many exceptions, that the title becomes rather a dissertation upon laws than a rule of practical justice. It is obviously impossible for any human foresight to follow the infinitely possible combinations of human actions. This possible variety is, in fact, a genus, of which all the species must be individuals. Hence the voluminous code of our own laws, and of every free state. The Roman lawyers endeavouring at the same perfection, and having greater obstacles to encounter in the uncircumscribed power of the Prince, have expanded their collection to the same magnitude. They honestly endeavoured to foresee and provide for every thing, in order that, in every thing, they might have a rule to oppose to the will or interpretation of the Prince.

The law of libel varied in Rome with the Government. This law, under the Decemviri and Sylla, we

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have already explained. After the death of Sylla, Julius Cæsar* seems to have engrafted upon the laws læsæ majestatis some of the laws of Sylla relating to the defamation of public authorities. Satire, however, was not much checked till the conclusion of the reign of Augustus, who restrained it for the sake of some favourites.

When libels became once more a part of the crime læsæ majestatis, they ceased to have the accuracy of any distinct offence. Thus Cremutius Cordus, in the reign of Tiberius, was condemned for having called Cassius the last of the Romans. During the reign of the latter Emperors, libellers were occasionally restrained by severe punishment, or tolerated by the indolent clemency of the Prince. Under Titus almost all libellers were exempt from punishments; that is to say, they were no longer exposed to the penalties læsæ majestatis. Under Domitian they were hunted down; but they revived under Nerva and the Antonines. Constantine pursued them with vigour, and under the mask of a war against libellers waged a persecution against a religious sect, the Donatists. Valens and Valentinian considered libellers to be more odious than hordes of barbarians. Theodosius, with a magnanimity more to be praised than imitated, held them in contempt.

Indeed, under the latter Emperors, the injuries of reputation, like all other injuries, had a more precise rule of estimation. In cases of scandal, or libels not imputing capital crimes, the Prætor gave damages ac-

* Slander, written or spoken, against a Magistrate, was directed to be punished in a more exemplary manner; but there is reason to believe that the punishment was not capital.

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cording to the quality of the injury, and the dignity of the person injured, and, unless the charge were of that kind which the state had an interest in punishing, the truth was no vindication[x]. At the same time, it was competent to the offender to negative the imputation of malice.

[x] There is no doubt of the truth of this proposition upon a diligent examination of the Roman Jurists. Gomes. 3, resol. 6. n. 2. Myus 4. obs. 4. Gail. 2. obs. 99. Covarr. 1. resol. 11. n. 6 and 7. Clar. lib. 5. § injuriarum. 15. Wesen. parat. n. 8. Atque hanc distinctionem passim in judicando servari tradit Christin. vol. 4. Deces. 202. not. 32.—Vide Wesenb. Vinn. aliosque interpretes in Lib. 4. Tit. 4. Inst. Just.—A distinction has been taken between the different classes of libels. Those against the state, or such as imputed capital crimes, have been called exclusively Famosi Libelli. Libels, merely satirical and defamatory, have been termed mala carmina, or scriptæ injuriæ. It is unnecessary to say, that, in the severe times of Roman justice, the former were punished capitally; the latter only as common injuries. Vide Gothofredi Comm. de Fam. libellis.

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CHAP. II.

OF THE ORIGIN OF THE ENGLISH LAW OF LIBEL.

Such were the spirit and manner in which libels were regarded by the Roman law. It is unnecessary to say, that the ruins of this system have, partially at least, served for the materials of all the present Codes of Europe.

It is impossible, and it would answer no purpose, to trace up any particular usage of the common law of England to its original.

There are many remains of the peculiar genius of the civil law in the institutions of this country. The customs of the ancient Britons were engrafted on the Roman law, and perhaps the original energy of that code was, in some degree, restored by the vigour of the new stock. The Roman law, as is well known, was administered in this kingdom under the most celebrated of their own lawyers[y]; and it was one of the maxims of Roman policy to admit the laws as well as the Gods of the conquered nation, and to change only so much of the ancient usages as might be consistent with the dominion of their own code.

Before the conquest the common law had settled into a compendious system. It is reasonable to believe that Alfred had accomplished such a mixture of the rules and principles of the civil law, as were adapted to the

[y] Papinian.

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manners of his age, with such of the Saxon usages, which, through issuing from the woods of the north, had the stamp of a noble freedom. The researches of Selden, likewise, give every reason to suppose, that the piety of Alfred induced him to incorporate in his own code much of the divine revealed law, and to chastise and correct the moral law, as given to the Jews, by the more perfect charity of the Christian system[a]. A persuasion of this kind, perhaps, induced Lord Coke to declare, and Lord Hale to repeat after him, that Christianity was part of the common law of England[a].

The laws of England took very early notice of slander, as an injury to the individual, and an offence against the public peace. Libel, the more enlarged form of the abuse of speech, was only scarcely noticed, because in a rude and unlettered age it was only scarcely known. Libelling, indeed, could not be the crime of an illiterate people.

King Alfred commanded that the forger of slander should have his tongue cut out, unless he redeemed it by the price of his head. "Si quis publicum mendacium confingat, et ille in eo firmetur, nulla levi re hoc emendet, sed lingua ei excidatur, nec minori pretio redimi liceat, quam juxta capitis æstimatione[b].

A law of Edgar is to the same purpose[c]. Canutus, the Dane, re-established the laws of Alfred and Edgar

[a] Mirror. 301. Selden on Law and Gov. Ed. 5. 60.

[a] 2 Inst. 220. Ventris 293.

[b] Wilk. Leg. Ang. Sax. 41. Pl. 28. Lamb. Sax. Laws. 29. Pl. 28. Mirror. 301. Selden. Discourse on Law and Gov. 5th Ed. 60.

[c] Lamb. Sax. Laws. 64. Pl. 4. Wilkins Ac.

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with the same severity. " Et si quis alterum injuria diffamare velit, ut alterutum vel pecunia vel vita ei diminuatur, si tunc alter eam refellere possit, perdat linguam suam, nisi illam capitis æstimatione redimere velit[d]."

In cases of this kind it was, perhaps, expected that the subject of the slander should be false, and as few could write, and not many read, the offence which is formally called libel must have been rare. As to that particular description of the offence which is called a seditious libel, it is to be feared that the simplicity of that age would have been puzzled to strike the line between sedition and treason.

Under the Norman kings, in the administration of criminal justice, a mildness borrowed from the civil law superseded the former Gothic barbarity with respect to punishments. Bracton, who wrote in the reign of Henry III. repeats the rule and language of the common law, as marking off the offence of libel, assigning it, however, that rank in the class of injuries which it maintains to this day. The words of Bracton are nearly the same as those of Justinian in his Institutes:—

" Fit autem injuria, non solum cum quis pugno percussus fuerit, verberatus, vulneratus, vel fustibus cæsus, verum cum ei convitium dictum fuerit, vel de eo factum carmem famosum, et hujusmodi," fol. 115.

Though this be the language of the civil law, it is recorded by Bracton as the received common law of England at his time.—Of Bracton, as an authority, Lord Hale speaks in the following manner[e]:—" The book

[d] Wilk. Leg. Ang. Sax. 136. Pl. 15. Lamb. Sax. Laws. 110. Pl. 15.
[e] Hist. of Com. Law, vol. 1. p. 270.

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itself in the beginning seems to borrow its method from the civil law. But the greatest part of the substance is, either of the course of proceedings in the law known to the author, or of resolutions and decisions in the Courts of King Bench and Common Bench, and before Justices Itinerant."

There is not much to be found in the year books, and the ancient reporters with regard to libels, as it was not till the invention of printing that the offence could become common. The action of slander, which is the same in principle, makes an earlier appearance; but it is to the credit of our national manners that no action for scandalous words appears to have been brought before the reign of Edward III.; and so rare was this action even then, that we find but one in the whole reign of that Prince[f].

The people of England in that age were a military people. The offices of the law were in a great measure superseded by the imagined obligations of chivalry. It was a point of honour with every one to be sufficient for his own defence, and to assert and avenge his honour, and personal rights, by his sword.

The first notice which the statute law takes of the offence of slander after the time of Bracton is by the statute of Westminster 1st.

The reason of this act is stated in the preamble:— "Forasmuch as there have been oftentimes found in

[f] There were but three actions for words in the 22 years of Edw. IV. one only in the reign of Hen. VII. In the long reign of Hen. VIII. there were but five actions. In the time of Eliz. they began to multiply, as we find in Coke's Rep. 4. lib. where there are seventeen adjudged cases on this action. March Act. for Sland. 4.

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the country devisers of tales, whereby discord or occasion of discord, hath many times arisen between the king and his people, or great men of the realm, as had lately been experienced in the reign of Henry III. therefore it was commanded that from henceforth no one be so hardy as to tell or publish any false news or tales whereby discord, or occasion of discord or slander, may grow between the king and his people, or the great men of the realm; and whoever does so shall be taken up and kept in prison until he has brought into court the first author of the tale."

This from the nature of the thing became the severest punishment that could well be devised, as it might amount to perpetual imprisonment.

The next statute is that of the 7th, Rich. II. de scandalis magnatum.

The two statutes against the spreaders of false rumours are said to have been procured by the Duke of Lancaster, who was in little favour with the people, and, at the time of the insurrections among the Vilains, had been distinguished as a principal object of their fury. The first of these is stat. 2, Rich. II. stat. 1, c. 5. The design of this act will be best understood from the preamble.—"Of the devisers (says the Act) of false news, and of horrible and false lies of prelates, dukes, earls, and barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and of other great officers of the realm, or of the things which by the said persons were never spoken or done, or thought, in great slander of them, and whereby debates or discord might arise

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betwixt them, or between them and the Commons, and great mischief to the realm," &c. These were the objects meant to be aimed at by this statute, and it was enacted that none under grievous pain be so hardy as to devise, speak, or tell any false news, lies or other false things of the above-mentioned persons, whereof discord or slander might arise within the realm[g].

Those who offended therein were to be liable to the statute of Westm. 1st, above-mentioned, which directs such offender to be taken and imprisoned till he has found the person by whom the speech was moved; but this not being likely to produce the effect intended, it was enacted by stat. 12, Rich. II, chap. 11, That should he not be able to find such person, he should be punished by advice of the council, notwithstanding the statutes.

Upon the statute 2d of Rich. II. there was no action brought till the 13th of Hen. VII. which was above a hundred years after it had become law: we have therefore no cotemporary exposition.

The occasion of the act de Scan. Mag. is mentioned in Cotton's Abridgement of the Records of the Tower[h]. The design of the act was to prevent those imminent dangers which might be occasioned by false slanders of the peers and great officers of the kingdom. The parts

[g] Vid. Black. Vol. IV. 148. in notes.

[h] Cott. fol. 173. num. 9, 10, and 2 Mod. 181, at the summoning of the Parliament the Bishop of St. David declared the causes of their meeting, and told both the Houses of the mischiefs which had arisen by divers slanderous persons, sowers of discord, to prevent which the Bishop desired a remedy beyond that given by the proceeding of common law, which he did not deem sufficiently severe and exemplary in its penalties.

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of the act are three; first, reciting the offence and mischief, designating the evil effects, and appointing a penalty. In substance, this statute creates no new offence, and prohibits nothing but what was prohibited by the common law before; but, in respect to the dignity of the persons for whose protection it was made, it comprehends within its penalties the less offensive modes and terms of slander, of which the common law took no specific cognizance, and marks out a new proceeding to redress them. The offences to be punished by this act are mala in se; and against the moral law; the scope of the act therefore, was not only to punish such things as import a great scandal in themselves, or such for which an action lay at the common law, but also such reports as were anywise contemptuous towards the persons of peers and the great men of the realm, and brought them into disgrace with the commons. Secondly, The statute inflicts no new punishment on the offender; for, at the common law, any person for such offences as are therein described might have been fined and imprisoned, either upon indictment or information brought against him, and no other punishment is given by the statute but imprisonment. Even at the common law scandal of a peer might be punished by pillory and imprisonment[1]. Thirdly, it appears that scandalum magnatum, as all other slander, was an offence at common law, but aggravated, in estimation of the peerage, by an act of parliament, which obliges the plaintiff now, upon the statute, to prosecute tam pro domino rege

[1] Atkyns Just. 2 Mod. 162.—5. Coke 125—12. Coke 37.—7. Coke 59.—Lamb's Case.

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quam pro seipso, which he could not do at the common law.

In the early cases it has been holden, that if an action of scandalum magnatum be brought upon this statute, the defendant cannot justify; because it is brought qui tam &c. and the king is concerned. But the defendant might explain the words, and insist upon some circumstance from the occasion of speaking them. But the rule was inflexible, that, if true, they could not be published, because the statute was to prevent discords[k].

Hudson, an author quoted with respect by Lord Mansfield, in his treatise on the jurisdiction of that court, of which he was a zealous defender, upon the grounds of the common law and the reverence due to its antiquity[l], says, that upon the speaking of words, though they be against a peer, the defendant may justify them as true[m].

Such was the practice of the court of Star Chamber, a kind of court of equity administering criminal justice, abhorrent from the principles of the constitution in its form, but, when honestly administered, a most useful subsidiary irregularity.

So much of chivalry still remained, that the authority and connections of the nobles were as yet too powerful for the ordinary course of the law. In the high dignity of the Star Chamber the most elevated offender

[k] Freem. 221, Poph. 67, Lord Raym. 879, 4 Bac. Abridg. 408, Bull. N. P. 2.

[l] Hudson's Treatise on the Star Chamber.

[m] He must be understood to advert to the common action of slander brought by a peer, by which, as a personal reparation was only sought, the truth of the words was always an answer to a claim of damages.

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found his peer. Even the reason of the constitution almost seems to dispense with juries where they could be of so little use.

It was in this court that the earliest cases of libels are to be found in any frequency.

We have above denominated the court of Star Chamber a court of criminal equity, and, acting in this character, it gave a body, and distinct shape, to what previously existed in fainter lines perhaps, and more in principle than in received practice in the common law. The popular writers on the constitution have taken their character of this court rather from its abuses in bad and violent times, than from the course of its ordinary practice in the tranquil periods of our history. They have condemned it from its contradiction to abstract principles, and from their own knowledge of its effects and mischief. In wanting juries it appeared to them to want every thing. They forgot, that in the infinite variety of human means and actions, a movement, to borrow a term from the mechanic, is best procured by oblique forces; and that an instrument of despotism may thus be made auxiliary even to the best purposes of liberty[n]. It is unfair to form our judgment upon

[n] Of this court Lord Coke speaks in a strain of eloquence unusual to him, and at a period of his professional life when, whatever might once have been his disposition towards high prerogative, it had cooled, if, indeed, it had not yielded to a new impulse. It is well known that Lord Coke, in his latter days, was the most strenuous and rational maintainer of the popular freedom. "It is," says he, "the most honourable court, our Parliament excepted, that is in the Christian world; both in respect of the Judges, and their honourable proceedings according to their just jurisdiction, and the ancient and just orders of the court. For the judges of the same are the grandees of the realm, the Lord Chancellor, the Lord Treasurer, the Lord President of the King's Council, the Lord Privy Seal, all

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the acts of former times on the principles and knowledge of the present. Nothing would undoubtedly be so truly odious as any thing in the nature of the Star Chamber under the present circumstances of judges and juries. But might there not have been some period of our history in which the superior learning of the high officers of the church and state, and the collected authority and splendour of the nobles immediately attached to the court of the king, were a better safeguard for the public peace, than the intelligence of juries in a barbarous age, or their independence at a time when every peer was the sovereign of his vicinage. The Star Chamber became useless when the community became improved; and it became dangerous when it became useless. It was then too near the source of temptation, and certainly too frail in its constitution, to keep its honesty.

In that part of the institutes in which Lord Coke treats of the Star Chamber*, he says, that the main cognizance of the offence of libel was taken almost into the particular keeping of that court, as the heinousness of the crime, and the peculiar contumacy of the offenders, seemed to require a tribunal of more than common dignity. The punishments of this court, he says, were

the Lords Spiritual and Temporal, and others of the King's most Honourable Privy Council, and the principal Judges of the Realm, and such others of Parliament as the King shall name. And they judge upon confession, or deposition of witnesses, and the court cannot sit for hearing of causes under the number of eight at least; and it is truly said, the Court of Star Chamber, if we regard antiquity, is most ancient, if dignity, most honourable. This court, the right institution and ancient orders thereof being observed, doth keep all England quiet." 4 Inst. 65, chap. 5.

* 3 Inst. 220.

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likewise adapted to the mischief of the offence, being imprisonment, pillory, fine, whipping, loss of ears, and brands in the face.

It is necessary, however, to avoid falling into an erroneous opinion, too prevalent with some popular writers, that the Star Chamber was the inventrix of this legal notion of libel, and that by a kind of forced construction, in the nature of an equitable fiction, it appended it to the reason of the common law. This is one of the most frequent, but certainly the grossest mistake of these writers. The Star Chamber grounded, in pretext at least, all its right and authority in the common law. It exercised its jurisdiction in libels as a part of that common law. It assisted and concurred with the other courts of the king in administering the law upon this offence. If the Star Chamber appear more prominent, it is from the concession of the other courts to its dignity [p]. The inferior magistrate was silent, because the superior was by his side. It is scarcely necessary to produce instances of the concurrent cognizance of the common law over the offence of libel. The commissions of Oyer and Terminer, almost as old as our statute law, give authority to inquire de illicitis

[p] The court of Star Chamber, says an excellent author, whilst kept within due bounds, was of the greatest use to preserve the peace and security of the kingdom; and perhaps was the only court which, by its ordinary and proper jurisdiction, could effectually prevent and punish riots, perjuries, and other misdemeanours of the highest nature. But being made use of by the court to support proclamations and orders of state, and to vindicate illegal commissions and monopolies, that extension of their power became a grievance insupportable, and the nation was never easy till that court was entirely suppressed by Act of Parliament. Disc. on Treason and Attainder, by Rich. West. Chancellor of Ireland, 1725.—p. 94.

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verborum propalationibus[q]. 12. Coke 13. 2. Inst. 228. The offence was always considered in the nature of a public injury and punishable by indictment.

In the constitution of the more subordinate office of justice of the peace the law did not omit to give them charge over scandal and libel; and (34 Edw. III, c. 1.) by the express words of their commission gives them power to hear and determine the offence of libel. 2 Hawk. P. C. vol. 2. c. 8. 60. 1 Lev. 139. 1 Sid. 271. 2. Wills. 160. Lord Mansfield says, King v. Ripsal, 1 Black. Rep. 368, that libels are contained within the commissions of the Justices of the Peace.

It has been contended that the Star Chamber was not a court at common law, but grew out of a statute in the reign of Henry VII. This argument, however, would lead to conclusions beyond the intention of those who employ it. If the Star Chamber had this recent origin, it most certainly could not be the parent of the doctrine of libels, which, as we have above shown, has been expressed and exercised from the earliest times of the monarchy.

It is false, in fact, therefore, to give the Star Chamber the merit or demerit of the present notion of libel. The Star Chamber adopted only the language and notions of the common law. The usurpation of that court was, in fact, an usurpation of jurisdiction, not of law. The Star Chamber likewise administered the law in cases of perjury, forgery, riots, conspiracies, and frauds. As well might it be said that this court introduced these offences into our common law. As well might it

[q] Per. Holt, C. J.—"Those words in the Commission, mean words against the Government."—In Queen v. Langley, 2. Lord Raymond, 1060.

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be mentioned as a slur against our present legal doctrine of riots, that it derived its origin from the Star Chamber.

Whilst this court was in the fullness of its authority, the courts of common law never failed to take cognizance of any cases of libel and scandal which came before them. Lord Coke, 4 Inst. 66. c. 5. enumerates offenders sentenced by the common law courts to fine and imprisonment for libel and slander.

The power exercised by the Star Chamber was not, on the whole, unlawful. One of the reasons, indeed, for putting down the Star Chamber was, because its authority was in the King's Bench. Comb. 36. Lord Holt declared, that the King's Bench possessed all the lawful power of the Star Chamber. Comb. 142. 10. Mod. 187; and that the court of Star Chamber was taken away because the crimes were punishable in the King's Bench, 5. Mod. 464, This reason for suppressing the Star Chamber is likewise intimated in the preamble of the statute, 16. Car. c. 10. To sum up this argument briefly, the strongest objections to the Star Chamber are to its jurisdiction, and not to its law. Its law was good, and its interpretations upon many points are authority, if not adjudged law, to the present day.

It may here, however, be objected, that the present received doctrine and extent, if not the offence itself, was the creature of the Star Chamber; and that it gave it that yielding genus, which readily opens to admit every species. This objection goes merely to the wisdom and equity of particular decisions, and for this we are certainly not contending. The court, indeed, was set aside, because it was wanting in this wisdom and

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equity. It is the business of another part of this work to inquire what is and what is not a libel; what is the true and legal notion, and what the abused construction of it. Libel, like every other general offence, the nature of which lies in description and not in definition, has been variously construed in various times; being a mere legal reason, and therefore variable not only according to all the circumstances of the times, but according to the abilities and information of the judges. In ignorant and despotic times it had not the same limits and precision as in the days of liberty and science. It is unreasonable to object to our reformed religion that it was once superstition. It is unreasonable to object to our present tempered and corrected notion of libel, that, in another form, it was at one time an instrument of tyranny and extortion in the Star Chamber.

It is better, however, to convince by reason than by authority. The rights of personal security include those of reputation. It is a maxim of the common law that there is no right without a legal remedy. The comprehensive remedy of the action on the case in civil injuries, and indictment in wrongs of a public nature, founded on principles of common law and justice, is every day applied in cases of private fraud and misdemeanours. It is no objection that the act never occurred before. The law is presumed to have willed it in principle if not in the individual case; to have willed it in the end if not in the means. The wise provision of the Stat. West. 2. cap. 24, for the writ of Casu Consimili, is founded upon this principle with respect to civil injuries primæ impressionis. Whatever be the mode of wrong, a remedy shall go forth to correct it.

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This is one of the glories of the English law. So with offences which concern the public. Whatever is indecent, whatever has a tendency to disturb the peace and tranquillity of the community, whatever is of evil example, or contagious disorder, whatever is contra *bonos mores, civis, si non hominis,* is comprehended within the large reason and remedy of the common law, the objects of which are the well being and due peace and order of the family of the state.

We have shown the law against libel and slander to have existed centuries back, and as there is nothing to contradict, but every thing to confirm it, the law will suppose it time immemorial. The main effective mode of libelling, writing, is certainly immemorial, and writing no sooner commenced than the abuse grew up with it, and therefore in legal intendment, as explained by constant practice, the law to restrain it. We have the same authority for the law of libel which we have for the most important maxims of the common law, whether relating to our liberties or property. A succession of precedents, beginning in distant ages, forms the common law. They prove the law, not only by the practice, but by the acknowledgment and submission implied in the uniformity of such practice. Doubtless, it is the reason of a precedent, and not the precedent itself, which obliges, but when precedents for the punishments of a particular offence are found in numbers, and in all seasons of the constitution, their reasonableness and conformity with the rule of the common law are to be deemed, as it were, written in their constancy, and ought not to be captiously questioned or put to their vindication. The law of libel, as we have shewn,

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is likewise to be collected from ancient text writers, whose works are to be regarded as authority, not only as containing the rules of the common law, derived from records and adjudged cases, but as embodying those traditions and usages of which no records now exist.

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CHAP. III.

OBJECTIONS AGAINST THE LAW OF LIBEL CONSIDERED.

HAVING now completed our inquiry concerning the origin of the law of libel as a matter of history, it is necessary to take a review of some objections which have been urged against it, and which have acquired a popular, and somewhat specious value, from the want of a careful examination—We have already shewn that, in almost all the text writers on English Law, the law of libel has a distinct mention; that it appears to have an immemorial existence, and to be confirmed by frequent precedents.

But it has been objected to the law of libel, that it is no where to be found accurately laid down and defined; that it is not, like the law of treason, rescued from the vagueness of generality, but that it exists at large, and may be drawn out so as to take in and cover whatever the will of a court may wish. Many things are prohibited by the reason and practice of the common law without the authority of statutes, or any distinct prohibition in terms. There are, in fact, two ways of legal prohibition; in the one case, what may be termed the prohibition in act; in the other, the prohibition in the end

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or principle. In cases of the violation of property, or injuries to personal security, the injury lies in a simple and intelligible act, and the legislature has only to prohibit theft and assault. But where the nature of the act is compounded of an infinite variety of circumstances, and the same act, in one state of things would be an injury, in others only an exercise of right; in such cases it is evidently impossible to prohibit in *specie*, and the legislature is necessarily driven to prohibit in *genere*, *principio*, *aut fine*. The truth therefore is, that the offence of libel, as a generality, is necessarily left as uncircumscribed as is the natural possibility of the injury. In plain words, it is limited as sedition is limited, as blasphemy is limited, as gross immorality is limited; not in this or that shape, not in these or those words, but in every shape, and in every term, in which it can offend God or man.

There is another objection of a similar kind; that there is no distinct and *nominatim* enactment against libel. This objection might, in fact, be answered in one word; the enactment of the law is contained in the punishment of the offence. It is not enacted in terms, because it is supposed to be written in the hearts and reasons of all. It is not enacted in words, for the same reason that murder, arson, larceny, and other atrocious crimes are not in like manner prohibited. The knowledge of these crimes is amongst the first elements of human reason. It is a principle of our common law that every one shall be presumed to know the duties of morality. This is the common well known distinction of mala prohibita, and mala in se; the law of the land does not speak where the law of nature has spoken before.

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It is not, however, to be concluded, that a law, and particularly a law which lives in daily practice, has never existed in writing because the record is not to be found. All those rules and maxims which now obtain on the footing of common law were, probably, once in writing, and had a formal commencement, though time has worn out the records, and left us tradition, and received use, to vouch their existence.

Another objection, more general, and of more popular weight and currency is, that the received doctrine of libel is in some points contrary to morals, and therein to reason; and in no point more so, than in the principle that truth itself may be criminal, and that the truth of any alledged libel is no sufficient answer against a public indictment. It is demanded how law and morals can thus be at variance? How truth can be deemed injurious to society, and how law can thus array itself against an acknowledged good—the progress of truth, in religion, morality, and individual reputation.

To this it might be sufficient to answer, that the effect of libel is a two-fold damage;—a damage to the public order by provoking private contentions, technically termed breaches of the peace, and a damage to the individual in his character and credit. Now it is unnecessary to say, that the public peace may be equally interrupted by the provocation of a libel, whether the subject matter be true or false; and, therefore, that the truth of libellous charges cannot purge them of their public mischief.

In this view of the matter, that is to say, as the public peace is concerned, they are equally mischievous, and

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therefore equally public wrongs, whether true or false. The public wrong is not in their truth or falsehood; indeed, not at all in their subject matter; but in their contempt of the law and of the magistrate, and in the disturbance of the general order of society.

One of the first and most immediate objects of law is to withdraw the prosecution of private differences from the passions of the parties, and to administer equity and justice by the sober and equal wisdom of the magistrate. But the direct tendency of libels, whether true or false, is to render every man the judge of his own cause; to accuse our neighbour before the passions and prejudices of a public assembly; to excite tumults, and to encourage private revenge. Is it necessary to explain how a license for such accusations would destroy the peaceable economy of society, and how many allegations may be true which ought not to be exposed to the public? Let us consider, that there are different classes and degrees of aberration from the rule of right, whether in law, in morals, or in the propriety of nature. In law, there are crimes and misdemeanors. In morals, there are vices, through a long and infinitely graduated scale. In the propriety of nature, there are follies, levities, and natural defects beyond our own will. But in all these different classes, and differing degrees in the same class, there are corresponding differences of criminality and imputation, which, to be correctly distributed, require a very different judge from public opinion. Are all these, therefore, equally suitable subjects for public exposure? How many, for example, of these subjects of imputation, have one measure with the public, and another with the law. To instance; the

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law regards the act of forestalling and monopoly as a misdemeanour, and punishable as such—The people punish the same act by the tumultuous destruction of the offender and his property—The mild and sober wisdom of the law, seeing clearly its own object, and its strict bounds, performs its part by a peaceable abatement of the nuisance: the people, seeing the same object, but acting from passion instead of judgment, observe none of this salutary moderation; they set fire to, or pull down the house, and, perhaps, involve the neighbours in the ruin.

But this objection owes much of its currency to an indistinct perception of what is to be understood by the term truth. It is undoubtedly to the praise of the present age, that we have rejected much of those scholastic vanities which rather encumbered than assisted our reason; but may it not be a question, whether we have not confounded instruments with impediments; and, following the spirit of improvement beyond the just point, have not discarded the precision and exact severity of logic, together with its useless and mischievous subtilties.

Assuredly, there would be infinitely less error upon many popular subjects, if it were the habit to recall our terms to a just definition. Let us apply this observation to the term before us. We shall find that truth, considered abstractedly by itself, is nothing but the actual conditiou or state of things, such as they are; or, as the logicians more closely define it, *quo modo res sese habet*. Considered as the act of an agent, Truth, or to speak or write truly, is the act of declaring, relating, or writing any thing or every thing as it is,

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The right or duty of truth, therefore, is that right or duty which we may have to declare or relate the subject in question; a right not absolute, but relative; a right not inherent absolutely in ourselves, but depending entirely upon the circumstances of the matter in point; and not one of those rights which constitute our natural liberty, because it presumes a right over another. Truth, in fact, as the act of an agent, is the mere act or operation of the faculty of speech; we have a right to speak, as we have a right to walk, but we must so speak and walk, as not to injure and annoy others;—*sic utere tuo, alieno ut non lædas.*—Truth, or speaking and writing truly, is thus nothing more than an indifferent act, which, like other indifferent acts, may be either commanded or prohibited, permitted or restricted, by the magistrate. The opposite to truth is falsehood—The privative is silence, or not to speak at all upon the subject. The magistrate, therefore, in prohibiting truth in circumstances where it is injurious to the public peace, does not command falsehood, but silence.

But much, if not all, of the popular error upon this subject, arises from confounding the right of truth with the duty of truth, and truths of different kinds with each other. Thus, because it is a duty to speak nothing but truth, we conclude that we have a right to speak all the truth.—And because there can be no question with respect both to the rights and the obligation to speak, write, and promulgate, moral and religious truth, we extend the same notion of right and duty to the actions and circumstances of individuals, and we invest this kind of truth with the same sacred character and public

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and acknowledged utility, which belong to truth in the higher predicament of morals and religion.

When the law of England, therefore, pronounces truth, under certain circumstances, to be a libel, it has one simple object in view, namely, the maintenance of the public peace.—Crime is the proper object of law, and every thing is criminal which interrupts the established order of society. There is not a necessary concurrence of crime in law and vice in morals; an act, therefore, indifferent in morals, may be a crime in law, or may be commanded by the magistrate as a duty to the state. Every day's experience proves that there may be malicious truth. Moral actions are only to be estimated by their motives; and truth spoken with an injurious purpose puts on the nature, and engages in the guilt of falsehood.—Where the end is mischievous, the means cannot be innocent.—And to add one argument more, why should not law adopt the charity of religion, and command us, from a fellow feeling to each other, to be silent to the frailties of our neighbours?

Nor can the interests of society suffer from such restrictions. The tribunals are open for the punishment of crimes; and vices become crimes when they have any public effect. There ought to be no accusation where there can be no trial. The interest of morals can never be advanced by any public appeals in the nature of libel.—The offender is irritated and not reformed, and bad passions are nursed and encouraged by being gratified.

It has been stated to be another peculiarity in the law of libel, and objected to as such, that in many cases of criminal prosecution a master is made answer-

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able for the act of his servant: that the buying of a book or paper, containing libellous matter, in a bookseller's shop, has been deemed sufficient evidence to charge the master with the publication, although it should not appear that he knew of any such books being in his shop, or what were the contents.

It has been objected to the doctrine holden in these cases, that the rendering of one person criminally responsible for the act of another, under such circumstances, is in contradiction to the ordinary notions of criminal law; that the master, indeed, should always be responsible, *civiliter*, for the act of his servant; but that, in a criminal point of view, the *crime* of the servant should be solely imputable to himself; that there should not be any such anomaly in the criminal law as to punish one man for the act of another, and, least of all, to subject one man to a punishment of infamy, which can only be due to the immediate wickedness of another.

It is stated that this anomaly is peculiar to the libeller. It is demanded, if the driver of a public carriage maliciously overturn a passenger upon the road, whether the master, in that case, can become the subject of a criminal prosecution as well as of a civil action.—But, in the libel law, it is insisted, that the master is thus criminally responsible, and, therefore, punishable; not merely in damages of satisfaction, but in the penalty of example.

If you employ an agent, say they, to draw or accept your bills by procuration, should such agent act fraudulently, and abuse his trust, you are certainly answerable civilly; but would it not be a strange absurdity, if

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such agent should commit a fraud by forgery or fictitious indorsement, that you likewise should be indictable for his crime? Yet is there this anomaly in the law of libels. The bookseller's servant, his master being on a sick bed, or at a distance, commits the criminal act, and the master is called upon to pay the penalty.

Before we proceed to the answer of this objection, it is necessary to clear it of a sophism which pervades it throughout, and which gives it plausibility.

The notions of legal and moral crimes are here confounded, and taken as the same thing. It certainly would be very absurd to impute the crime of one man to another, and to punish the master for an act which proceeded from the criminal will and purpose of his servant. This would be an evident contradiction to all our notions of moral criminality. But legal criminality is totally a different thing—it is merely legal responsibility; and may therefore exist, and have a place, where there is no moral criminality whatever. Thus, for example, in the case of a nuisance shot down before a man's door by his servant[r]. Here is an evident legal responsibility thrown upon the master, and therefore a legal or criminal guilt; but, manifestly, without any moral guilt at all. The law and fact proceed here upon general principles; expediency, and ordinary presumptions. It is expedient that the law should always have some substantial subject of responsibility; and this subject is naturally the master, Under any other circumstance, it is evident that the most mischievous nuisances might be committed, and

[r] If my servant throw dirt into the high way I am indictable. Per Holt C. J. 1 Ld. Raymond, 264. 1. Bl. Com. 431.

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the punishment evaded. It is the general presumption, moreover, that such acts of the servant are either done by the express command of the master, or by his passive and culpable negligence.

There may be many cases which are exceptions to this presumption, and under which, therefore, there doubtless is a hardship in rendering a master responsible for the act of his servant. But such exceptions are only those particular cases which must necessarily happen under all general laws, the pressure of which is regarded as a necessary and particular hardship sufficiently compensated by the general good of the rule. And more especially as the law of England, in its manner of administration, if not in its letter, has many indirect remedies for such incidental hardships; for example, in the discretion of judges, and in the practice of juries, who are bound to take the whole complex case into their consideration.

It is a general rule of law, moreover, to prefer the public to the individual. Now, in all such cases of negligence, in the publication of libels by the master, that is, by his servant having published them without his knowledge or express consent, it is admitted, nor is it complained of, that any individual injured by such libel may maintain his civil action against the ignorant or passive master. And shall not the public have its remedy? Shall a public nuisance be without the only satisfaction of which the public is capable? Surely it is unnecessary to answer this question.

The matter of fact is, that the public must have its remedy for such injuries, and informations and indictments are the only means of procuring such remedies;

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they are the PUBLIC ACTIONS, and imply a legal, but not, necessarily, a moral criminality.

But to meet at once the point of the objection.—Will it be insisted that such vincible ignorance, and wilful negligence (as all negligence is wilful) of the master, as necessarily produce so much mischief to society; will it be insisted, we say, that this ignorance, and this negligence, are not public crimes in the master? Where, then, is the injustice, that, being guilty of crimes, he should be criminally answerable? It was in his power not to have been guilty of this ignorance and negligence. He exercises a trade of danger, and it is his duty to have the necessary precaution, and to guard the avenues of mischief. If a druggist, for example, have a boy in his shop totally ignorant of the quality of all medicines, and that boy should sell poison, would not such druggist be indictable for a misdemeanour as against the common health and safety of society? In a word, in every trade, from which a mischief may ensue to the public, there is a public obligation of caution, and most attentive vigilance upon the master, and the breach, or absence of such watchfulness, is a crime; the degree of which is, legally, and even morally, according to its mischief, and therefore, as such, may be punished as a misdemeanour, though certainly not as a capital crime.

Therefore there is no anomaly; the crime of the master is in his vincible ignorance, and wilful negligence. The law of libel, as we have above said, has nothing peculiar in it.—It is a part of the general criminal law of the country.

There is yet another objection with which we shall conclude the present Chapter.—It is said, and with

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truth, as a general maxim, that *actus non facit reum, nisi mens sit rea;* that the guilt of all crimes consists in the malice and evil intent of the offender; but that, in libel, the criminal intention is collected from the act; that it is treated as the formal presumption of law; that it is not required to be proved by the prosecutor, nor is it suffered, in the generality of cases, to be rebutted by the defendant.—It is contended that the malice with which the offender is charged should be a subject of express proof, and that it is contrary to reason, and the analogy of law in like cases, to assume, in the investigation of a crime, the substance of the charge.

It is urged, that the motive of many publications, which the law deems to be libels, may be innocent and even laudable; and that, without the proof of malice, or what is equivalent to malice, the mere act of publishing or composing a libel ought not to be the subject of punishment.

This objection only becomes specious from the misapprehension of the term *malice*.—Malice, in legal understanding, implies no more than wilfulness.—The first inquiry of a civil judicature, if the fact do not speak for itself, as a *malum in se*, is to find out whether it be wilfully committed: it searches not into the intention or motive, any further, or otherwise, than as they are the marks of a voluntary act; and having found it so, it concerns itself no more with a man's design, or principle of acting, but punishes without scruple, what, manifestly to the offender himself, was a breach of the command of the legislature. The law collects the intention from the act itself;—the act being in itself

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unlawful, an evil intent is inferred, and needs no proof by extrinsic evidence.—That mischief, which a man does, he is supposed to mean, and he is not permitted to put in issue a meaning abstracted from the fact.—" The crime consists in publishing a libel; a criminal intention in the writer is no part of the definition of the crime of libel at common law."—" He who scatters firebrands, arrows, and death (which, if not an accurate definition, is a very intelligent description of a libel), is *ea ratione* criminal.—It is not incumbent in the prosecutor to prove his intent; and, on his part, he shall not be heard to say, ' Am I not in sport?" *

To determine, therefore, the guilt of a civil act, and to inflict punishment on the offender, there is no need of knowing his motives.—Human laws require no justification in enforcing penalties for an act prohibited by the magistrate,—in its consequences injurious, and which has indubitable marks of being voluntarily committed.

* Vide the opinion of the Twelve Judges delivered in the House of Lords, Ap. 27, 1792, upon questions put to them on the subject of libel.—Journals of the House of Lords.

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CHAP. IV.

OF THE LIBERTY OF THE PRESS.

HAVING already shewn that the common law recognised the offence of libel from the earliest times, it remains to be considered, whether the invention of printing, a new and enlarged means of libel, in any way altered the legal acceptance of the offence; whether it abridged the rights of reputation, and, from respect to the general utility of the newly discovered instrument, absolved those who might employ it, from the responsibility attached to them in every other way. And this leads us to what is loosely called the doctrine of the Liberty of the Press, a term which has become elemental in all free Governments.

As this liberty is opposed to the power of the licenser, the term is correct. It is loose only, when distinctively used as a new peculiar right of the press. The liberty of the press is only the liberty of those who use it. It is only one of the personal rights of the printer.

When we have termed the press a new and enlarged instrument of publication, whether of good or evil, we have, in fact, pointed out that part of its nature

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which defines and circumscribes the law which attaches to it. The law of libel was not altered by the discovery of printing; nor is there any reason that it should be altered. The rights of personal reputation, and the rights of free discussion, remained the same. Printing is but the mechanical art of extending such discussion into a wider sphere. It was a new power, but no new right. It left, therefore, every thing as it found it, with the exception, that the acquisition of such power, and the greater facility of mischief, demanded an increase of vigilance on the part of the law.

In fact, the discovery of printing produced only the same changes in the law of libel, which commerce, agriculture, and the other improved circumstances of society, introduced into other penal laws.

An increased facility of commission, and the difficulty in the detection of crimes, are the two main circumstances from which it is usual with lawyers to justify the severity of our penal code. In the case of libels, however, this increased rigour must rather be looked for in the administration and construction of the law, than in any change in the letter. Hence, what has often been adverted to with another purpose, the greater frequency of prosecution for libels in modern times.

With respect to the correct acceptance of the popular notion of the liberty of the press, it is what is necessarily included in its equivalent and progressive terms, thinking, speaking, and writing.

In regard to human tribunals, every one is at liberty to think as he pleases. Human cognizance

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cannot reach what is beyond human evidence. It is contrary to the first law of nature to put a man upon his own confession. If you accuse, and he deny, there is at once an end of all trial. Upon these grounds it has been the maxim of every code that thinking is beyond its capacity.

When these thoughts are embodied in words, they become in that shape moral substances; they produce palpable and material effects upon the personal rights of others. Hence the peculiar felicity of the expression of the Roman law, which, in its technical description of an injury similar to our assaults, employs the words, *pulsas et verberas me lingua.* In this shape, therefore, as being naturally capable of injury, they become cognizable by law. Writing is the further publication of words, as printing is the further publication of writing. They are all different forms of the same thing, namely, publicly speaking. They are all therefore, comprehended within the same term; have all the same extent of right, the same limits from the rights of others, and are all contained under the same compass of law.

The liberty of the press, therefore, properly understood, is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press. This definition, or rather description, will lead us not only to an accurate conception of the thing, but to the origin of those notions, and which some writers have deemed prejudices, entertained in favour of it in a popular constitution.

The press, it has been said, is the creature of human

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ingenuity, exerted in an improved, and therefore in a late progress of society; it is not, nor can be supposed, cotemporary with the state of nature; how, therefore, it is demanded, can the liberty of the press be a natural right? What do you intend therefore when you speak of the sacredness of this right, and employ terms which are only appropriate to our absolute and inalienable rights? To this it may be answered, that the rights of nature, that is to say, of the free exercise of our faculties, must not be invidiously narrowed to any single form or shape. They extend to every shape, and to every instrument, in which, and by whose assistance, those faculties can be exercised. I have a right to walk, I have the same right to run, and, if by the exertion of ingenuity I could invent any way to fly, I have the same natural right to fly. The same character, therefore, of natural rights is conveyed to every right which is natural in its origin and principle, through all the possible modes and instruments of exercising and launching it into action and employment. In this manner the liberty of the press may be regarded as a natural right, and in the language of our best lawyers, and the daily acceptance of the constitution, it is, under this notion, invested with a corresponding sacredness. Such is one of the reasons of the partiality of the English law and constitution towards this right.

Another reason for this partiality is in the evident benefit, which our constitution, in particular, has derived from the exercise of this natural principle of liberty in the acquired organ of the press. The constitution herein pays back what it has received. Our constitution, in fact, as it at present exists, in a church

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reformed from the errors of superstition, and in a system of liberty, equally remote from feudal anarchy, and monarchical despotism, is almost entirely, under Providence, the fruit of a free press. It was this which awakened the minds of men from that apathy, in which ignorance of their rights, and of the duties of their rulers, had left them. It was by these means, that moral and religious knowledge, the foundations of all liberty, was refracted, multiplied, and circulated; and instead of existing in masses, and in the single points of schools and universities, was rendered the common atmosphere in which we all live and breathe. It was from the press that originated what is, in fact, the main distinction of the ancient and modern world, public opinion. A single question will be sufficient to put the importance of this subject in the strongest point of view. In the present state of knowledge and manners, is it possible that a Nero or Tiberius would be suffered to reign or live?

It is a maxim of policy in favour of natural liberty, that in every case of the deprivation or restraint of personal rights, the burthen is upon the Governors to show the necessity of such diminution and restriction.

It is therefore a maxim of the English constitution, that no liberty of the subject, either in itself, or in any instrument by which it may be exercised, shall be repealed, restricted, or abridged, unless the magistrate shall show, upon his part, a full and sufficient civil reason for such diminution.

This is, in fact, the main distinction between tyranny and liberty. A free Government is in the daily habit of repealing and restricting our natural rights; and this

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too, in a greater degree, and in more frequency, than any scheme of despotism whatever. No man complains that such acts of our governors are an invasion of our liberties. The reason of this is, that society, like the individual, is under the obligation of reason, and whatever is required by such reason, in other words, by general or individual prudence, constitutes our duty, and not our servitude.

Obedience to reason is the great moral law of our nature. The reasonableness of any civil rule is a sufficient foundation of the right of the magistrate, who has authority, to impose it. Rights, in truth, are nothing more than such qualities of acts as render them obligatory upon the reason of the agent. A right is only a legal term for a reason.

It is from these principles, therefore, that all the abridgements, and, as it were, reservations, of the liberty of the press by the laws of England, are founded upon some sufficient cause. The king, for example, not merely in his title, but by the good reason of the English law, is the defender of the faith, and the head and support of the established religion. It becomes, him, therefore, in this character, to guard the purity of the sources of our faith. Hence the sacred books are given into his peculiar custody. He only is allowed to publish and multiply copies. In a matter of this kind it will not do to have any contending authorities. The Vulgate Bible must be a record and a rule. It must be ONE, and therefore must be maintained such by being kept in a due legal custody.

It is the same with respect to acts of parliament. They peculiarly belong to the king, first, as a party to them,

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they being his own records; secondly, because it is necessary that there should be a correct and undoubted original. The king, therefore, in both these cases, has an exclusive and restrictive right, founded on the very sufficient reason of the maintenance of the public religion, and of the originals of the laws.

The same reason necessarily comprehends the sole printing of all books relating to the rites and services of the church, and the public liturgy.

Beyond these prerogatives, the crown has no restrictive power at common law over the press. The crown never exercised the art of printing solely, either by its servants or patentees, as was once falsely contended. The first book printed in England has no *imprimatur* or *cum privilegio*[1]. It is true, indeed, that, upon the invention of printing, and the experience of its wide effects, most of the princes of Europe seized upon the press as a kind of peculiar, and royal franchise; and under the pretext of providing for uniformity in religion, and the tranquillity of government, enslaved this great organ of human reason. They treated the discovery of printing, not as a mechanical invention which the ingenuity of man had thrown into the common stock, and therefore, after a due reward to the inventor, rendered common to all, but as something abscinded from the common capital,—as a kind of newly-discovered waste, to which their *dominium eminens* gave them a prerogative right.

The law of England, however, never acknowledged this kind of interpretation. As far as the reason of society required the Press to be restricted, it did so restrict it,

[1] Aymes' Typographical Antiquities.

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and gave it to the crown. But even in this act of restriction, it acknowledged the common and general right; for why should it have taken a part, why have marked out "so much belongs to the crown," if it understood the whole as belonging to it?

Imprimaturs were first introduced by the act of Uniformity, and borrowed from the Inquisition.

It is true, indeed, that the press in this country laboured long under the oppression of a licenser. What the crown began, the star chamber continued, and in an age of civil confusion, and therefore not having much leisure for literary curiosity, the office of the licenser was not felt as a considerable burthen to the subject. The two universities were permitted to publish from their own presses with the vice chancellor's imprimatur. Even the houses of parliament seemed to concur with the crown and star chamber in their jealousy of a free press. In 1643, several ordinances of parliament were made, or transcribed from certain decrees of the star chamber, against free printing, and all were consolidated in the famous licensing act of 13 and 14 Charles II.[u] This ordinance, which treated the press in no other light than a royal franchise, subsisted in full force till 1692, four years after the revolution, when the liberty of the press was restored[v].

The power of the licenser has been renewed in a limited degree by the 10 Geo. II. c. 28. By that act, no dramatic composition can be represented on any public stage, without the previous license of the lord chamberlain. This is a salutary regulation of the morality

[u] Dalton's Justice, fol. edit. title Printing, where the act is set out.
[v] Black. Rep. 118.

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and decency of public exhibitions, and if it can be said at all to interfere with the liberty of the press, it is an interposition well warranted by the interests of the public morals and peace.

What the press can only effect by slow degrees, and by a circulation through individual hands, a public stage, by the more immediate appeal to the eyes and ears, and by the powerful contagion of feelings in crowds, might effect at a single blow, and amongst multitudes.

The press moreover is, in some degree, restricted by various acts of parliament, regulating the publication and sale of newspapers. The design of these acts is to facilitate the remedy against the proprietors and editors in case of libels either of a civil or criminal tendency*.

The statute of 32 Geo. III. chap. 60, is the only act of parliament which touches the question of the liberty of the press since the 10th Geo. II. This statute is generally considered as restorative of the common law, and therefore merely declaratory. It enacts, that in an indictment or information for a libel, where issue is joined on the defendant's plea of not guilty, the jurors may give a general verdict on the whole matter, and the judge shall not require them to find the defendant guilty, merely on the proof of publishing, and on the sense ascribed to the supposed libel in such complaint or information. The statute is wholly silent as to scandalum magnatum, or the common action for a libel.

Having now executed the purpose with which we

* Vide 38 Geo. III. cap. 78, § 24.

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set out, that of a deduction of the law of libels from the earliest times to the present moment; and having shewn that it not only exists in reason, but has been established as a part of their practical law amongst all nations; and that the law of England, moreover, has always especially acknowledged it, not merely in the detached maxims and cursory reasonings of our early lawyers, but by a long and uninterrupted course of practice as found in every text book, digest, or institute of our best writers. Having thus made out both the fact and the reason, little remains to be said before we enter on our main subject, but very briefly to sum up.

To recapitulate, therefore,—

The liberty of the press is one of the forms of the liberty of speech and communication, and in every free state is considered as a part of our natural liberty, because, though the instrument of it be of civil creation, types and presses being certainly unknown to a state of nature, the substance of it is in natural right; every free state, therefore, invariably invests it with the sanctity and regard of a natural right.

Now the due notion of a natural right, or of natural liberty, which is the assemblage of those rights, is, the free use and exercise of our natural powers, those of thinking and speaking, and acting, restricted only so as not to injure, that is, not to impair any right of another.

When this natural liberty is adopted by a state, and becomes civil liberty, those further restrictions are justly added, which are necessary to the preservation of the state; and civil liberty is more or less perfect, according as these restrictions are such as only to accomplish this end, or such as to pass beyond it.

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In every society therefore, the liberty of the press may justly be restricted within those limits which are necessary to the above ends; which are necessary to maintain the establishment, and are necessary to maintain its exercise, and, without which, governments would be successively adopted and rejected like opposite paradoxes in the schools,—and, without which, no magistrate, no corporation, could execute their duties. Within these restrictions natural and civil liberty are the same; restriction for a sufficient cause not being contrary to the notion of liberty, which is the exercise of our natural powers restricted only by our moral obligations. Now as these moral obligations are necessarily increased when we enter into society, so is our natural liberty necessarily further restricted. But it still remains an equally perfect liberty, so long as those restrictions are only such as moral obligation, varying according to our state, points out. This in fact is the difference between independence and liberty; independence being an absolute physical freedom which belongs to no man, and liberty being that freedom which belongs to a reasonable creature, whose will is subjected to his reason.

There is nothing, indeed, upon which Englishmen are justly more sensible, than upon whatever has the appearance of affecting the liberty of the press. But our popular writers have certainly extended the notion of this liberty beyond what in reason it will bear. They have converted it into a native, an original, a primitive right, instead of considering it in the only proper point of view, as a right derivative and deductive from the joint rights of opinion and of speaking. This, including an exemption from the controul of a licenser, and all previous

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restraint from the mere suspicion of abuse, is the proper notion of the liberty of the press. And, with a very few exceptions, whatever any one has a right both to think and to speak, he has likewise a consequential right to print and to publish. But as no one can have a right to speak what is contrary to morals, to religion, or to the good of others; as no one can have a general and loose right of accusation, trial, and judgment; and as, even natural rights and the exercise of natural powers are necessarily limited when the purposes of society require it, so the natural power of speaking, and the consequential power of publishing, are always limited, by moral duties, and in many cases are frequently still further restricted for social ends and consequences. A man must neither speak, nor walk, where a positive law prohibits him for good purposes from either; and though it may be, and certainly is, a diminution of his natural liberty, it is no violation of it, where such restrictions are for his own or the general good.

We shall shew in the following pages, into what precise form these general principles, as limiting the freedom of the press, are thrown by the English law of libel. The liberty of the press, restricted as it may be, by the English law of libel, will be found wide enough for the exercise of every right and duty. It prohibits nothing but injury; it confines from mischief the employment of an instrument, as extensively pernicious in its abuse, as it is beneficial in its natural use.

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THE

LAW OF LIBELS.

BOOK II.

CHAP. I.

INTRODUCTION.

1. The end of all law is the security of the persons and property of men in civil society. For this purpose, it moderates the force and power of natural rights, and appoints certain forms and measures for their enjoyment. The rights of the person, being antecedent to civil society, are the first concern of the magistrate. Property, having its origin in convention, is secondary in order as well as import.

The greatest injury which any one can suffer is such as affects his life or produces a bodily loss. The next injury in kind is that which affects him in character. Injuries against his bodily safety and integrity have the legal designation of crimes. Injuries against his character, as having less violence in their mode, are termed misdemeanors. Both these species of injury, as immediately assailing our natural rights, are the first objects

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of consideration in all governments rightly administered. *Eadem famæ quam vitæ est habenda ratio, fama vitaque hominis iisdem legibus nituntur*[a].

2. Polity, or government, is one only of the divisions of morality, or the Law of Nature, more perfect in its present sanctions, though of infinitely less dignity in its objects and authority. Government is not in aid of the duties of men, but of their wants.

No man has a natural right upon the character of another; neither has he, without a call or commission, any such right in society.

As no man can individually assume to himself the power of administering justice, of trying, sentencing, and punishing offenders, so can no man likewise take upon himself to speak against those who seem to do ill; which is a sort of punishment, inflicting pain and damage upon the persons concerned.

Every man, indeed, by the divine and moral law, which society in no case abridges, has a commission, in due place and season, to admonish his neighbour offending; but otherwise to speak ill of him no private man has right or authority. In presuming to do it, he is disorderly and irregular, trespassing beyond his bounds, and usurping an undue power to himself,

3. The common law of England speaks the language of reason and religion. It places under the protection of the laws, and guard with the same sanctions, the good fame, as well as the life, liberty, and property of every man.—It considers reputation, not only as one of our pure and absolute rights, but as an outwork which defends, and renders them all valuable.—The law

[a] Juris Cons. Excerpt. apud Dig. Gothofredi. Ed.

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forbids revenge.—When it ties up the hands of some, it restrains the tongues of others. It defines the offence of libel, which is slander in its most aggravated shape, as follows:—

A libel is a malicious defamation, expressed either in printing or writing, or by *signs, pictures, &c.* tending either to blacken the memory of one who is dead, with an intent to provoke the living, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule. *Wood's Inst.* 444; *Hawk. Pl. Cr. c.* 73; *5 Coke,* 125; *Salk.* 418; *Ld. Ray,* 416; *Rex. v. Topham,* 4 *T. R.* 126; *Bl. Comm. vol.* 4. 150.

GENERAL DIVISION.

4. The offence of libel, according to its several objects, may be distributed under the following divisions:—

1. Against religion.
2. Against morality, or the law of nature.
3. Against the law of nations.
4. Against the state and constitution.
5. Against the King and his government.
6. Against the two houses of parliament.
7. Against courts of justice.
8. Of scandalum magnatum.
9. Of libels against magistrates.
10. Of libels against private persons.

Of these, therefore, we shall proceed to treat in their several orders in the present Book; and first, of libels against religion.

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CHAP. II.

LIBELS AGAINST THE CHRISTIAN RELIGION.

THE offences of slander, as we have above shewn, are many and various in kind; so many indeed as there are modes of speech and action to which they run parallel; they are accordingly distinguished by the objects which they respect. Some are committed against God, and are offences against piety, and moral duty, and become, as it were, trespasses against the light of reason and the law of nature.

The first grand offence of speech and writing is speaking blasphemously against God, or reproachfully concerning religion, with an intent to subvert man's faith in God, or to impair his reverence of him.

A reverence for God, and conscientious regard for religion, are the main supports of honesty, and, therein, of society and civil government; the sole curbs, effectually restraining men from fraud and violence; and the strongest principles leading to the performance of those actions, by which common life is adorned, and public order and peace maintained.

The most enlightened Pagan of his time has with good reason judged; "haud scio, an pietate adversus

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deos sublata, fides etiam, et societas humani generis, et una excellentissima virtus justitia tollatur." *Cic.*

Offences against religion by the common law of England, which are the subjects of speech and writing, and as such, within the direct path of our inquiry, are,—

1. All blasphemies against God, as denying his being or providence, and all contumelious reproaches of our Saviour Jesus Christ. 1 Vent. 293; 2 Str. 834; 4 Bl. Comm. 59.

2. All profane scoffing of the Holy Scriptures, or exposing any part to ridicule and contempt. 11 Mod. 142; Str. 416, 788; Fitzg. 65.

3. Seditious words in derogation of the established religion are indictable, as tending to a breach of the peace, which, in this sense, implies the amity, quiet, and confidence, of the whole family of the state, and the unshaken hope of future rewards. 2 Roll. Abr. 187; Cro. Jac. 24, 421.

Offences of this nature, says Hawkins, Pl. Cr. cap. 5, because they tend to subvert all religion and morality, which are the foundations of government, are punishable by the temporal judges with fine and imprisonment. They are offences at common law, and the prime abuse of speech and writing.

The statute law has likewise marked out certain offences against Christianity, in which it is merely declaratory of the common law, though, in some cases, it directs a new mode of proceeding, and augments the punishment of the offence. Reviling the sacrament of the Lord's supper with contemptuous words, &c. for which, by 1 Edw. VI. c. 1 (which was repealed by 1 Mary, c. 2, and revived by 1 Eliz. c. 1), the offender shall be

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be imprisoned, fined, and ransomed. 4 Bl. Comm. 50.

By 3 Jac. I. c. 21, "Whoever shall use the name of the Holy Trinity profanely or jestingly, in any stage play, interlude, or show, shall be liable to a penalty of ten pounds."

By 1 Will. III. c. 18, § 17, "Whoever shall deny, in his preaching or writing, the doctrine of the blessed Trinity, shall lose all benefit of the act for granting toleration," &c. This act, in addition to depriving the offender of the privilege above-mentioned, leaves the punishment of the offence, as for a misdemeanor, at common law[b].

We shall submit to the reader some of the leading cases with respect to this description of libel, and endeavour to ascertain the boundary between free and forbidden discussion[c].

Blasphemy is both a spiritual and temporal offence. Cro. Jac. 421; 2 Roll. Abr. 78. pl. 2.

In Tremayne's Entries there is a sentence pronounced by the court of King's Bench, to have a paper fixed

[b] *Per Lord Kenyon, King* v. *Williams, Guildhall,* 1797.

[c] An information was exhibited against one Taylor in the Crown Office, for uttering of divers blasphemous expressions, horrible to repeat, viz.—*That Jesus Christ was a bastard, &c. religion a cheat, and that he neither feared God, the devil, or man.* All these words were proved by several witnesses, and he was found guilty. Hale, Chief Justice, observed that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the court of King's Bench. For to say religion is a cheat, is to dissolve all those obligations whereby civil society is preserved: that Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law. King v. Taylor. Ventris, 293; Keb. Rep. 607.

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over the defendant's head, intimating that he had uttered blasphemous words tending to the subversion of government.

In the Queen *v.* Clendon, 10 Ann, there was a special verdict on a libel concerning the Trinity. The court had no doubt but that it was an offence at common law.

One Hall was convicted for a libel, entitled a "*Sober Reply to the Merry Arguments about the Trinity.*" 7 Geo. I. Strange, 416[a].

[a] The King *v.* Woolston being a leading case on this subject, it may be proper to give it at some length.

Five several informations were preferred against him by the attorney-general, for publishing five blasphemous libels, wherein the miracles of our Saviour were turned into ridicule and contempt, and his life and conversation exposed and vilified. Having been convicted on four informations for these blasphemous discourses, his counsel offered to move three matters in arrest of judgment.

1. That the book was not written against the Christian religion.

2. That, admitting it was an indecent attack upon our common faith, it was not an offence within the cognizance of the temporal courts at common law.

3. That the statute 9 and 10 W. III. c. 32, had appointed a less punishment for this offence than was given at common law, and had, therefore, by consequence, taken away the punishment at common law.

The second of these points the court said they would not suffer to be argued; "for the Christian religion is established in this kingdom; and therefore they would not allow any books to be written which should tend to alter that establishment." They observed, too, that as the Christian religion was part of the law, whatever derided Christianity, derided the law, and, consequently, must be an offence against the law; for the laws are the only means to preserve the peace and order of every government, and, therefore, whatever exposes them, strikes at the root of the peace and order of the government to be kept. That the case of the *King* v. *Taylor* was exactly founded on this reason, as it is reported in *Ventris*, 293. So was the case of the *King* v. *Hall*, where the buffooning of the Trinity was holden punishable by information. This, they said, was a point which carried with it such clear conviction in itself, that they refused to hear counsel give their reasons why they should be heard upon it.

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As the design of this treatise is not to compile cases, but merely to state such as contain leading and governing principles, it is unnecessary to enter into farther

Counsel then began to speak to the first point. They said, that the intent of these discourses was only to show, that the miracles of Jesus were not to be taken in their literal sense; for, as such, they were not great enough to prove his divinity; but that they were to be understood in a mystical and allegorical sense. But at most, the counsel observed, this book could only be considered as striking against one received proof of his Messiaship, and not attacking Christianity in general.

To the third point they said, that before the act of 9 and 10 W. the court could inflict a discretionary punishment, which might have been much greater than that prescribed by the statute; but that the intent of this act might well be construed to limit the discretion of the court, and thus take from the court that power of passing judgments which they had before; now, they observed, that if the power of passing the old judgment were taken away, the intent of the parliament might well be construed to be, to take away the old method of proceeding by establishing the new one.

To the first of these points the Court said, that they would not suffer it to be debated whether to write against Christianity in general was not an offence punishable in the temporal courts at common law. They desired it to be taken notice of, that they laid this stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points. That the attacking of Christianity in the way in which it was attacked in this book, was destroying the very foundation of it; and though there were professions in the book, that the design of it was to establish Christianity upon a true bottom, by considering these narratives in scripture as emblematical and prophetical, those professions were not to be credited, and the rule is, *allegatio contra factum non est admittenda.*

To the third point the court observed, that this was against an established rule, which says, that a new law, instituting a new punishment, shall not take away the old one, unless it change the offence, and make it of a different nature. *Easter Term, 2 Geo. II.* 1729; *Barnard, K. B.* 162; 2 *Stra.* 834; *Fitzgib.* 64.

It is worthy of particular attention, that Lord Chief Justice Raymond, in delivering the judgment of the Court, said, "I would have it taken notice of, that we do not meddle with any differences in opinion, and that we interpose only where the very root of Christianity itself is struck at." With him agreed the whole Court. *Fitzgib.* 66.

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details on this head, by collecting convictions for an offence, which the unhappy character of the times has rendered frequent amongst us. We shall conclude with the case of the *King* v. *Williams, coram Kenyon, C. J. Guildhall,* 1797*.

The defendant was fined, and imprisoned one year.

An information was exhibited against one *Peter Annett,* by the Attorney-General, for a certain malignant, profane, and blasphemous libel, intitled "The Free Inquirer," tending to blaspheme Almighty God, and to ridicule, traduce, and discredit his Holy Scriptures, and particularly the Pentateuch; and to represent, and to cause it to be believed, that the prophet Moses was an impostor, and that the sacred truths and miracles recorded and set forth in the Pentateuch were impositions and false inventions, and thereby to diffuse and propagate irreligious and diabolical opinions in the minds of his Majesty's subjects, and to shake the foundations of the Christian religion, and of the civil and ecclesiastical government established in this kingdom.

Being convicted upon this information, the sentence of the Court of King's Bench was, that he should suffer one month's imprisonment in Newgate, to stand twice in the pillory, once at Charing Cross, and once at the Royal Exchange, and then to be confined in Bridewell to hard labour for one year, and to find security for his good behaviour for the remainder of his life. *M. Term,* 3 *Geo. III.* 1763; 2 *Burn. Ecc. Law,* 781.

* The defendant was convicted of publishing a libel on the Christian religion, in the form of a pamphlet, addressed to the people, called *Paine's Age of Reason.* The libel was of the most impious and blasphemous description; it attacked the truth of the Old and New Testaments equally; assumed to argue that there was no genuine revelation of God's will existing in the world; and that Reason was the only true faith which obliged the conduct of mankind. In other respects, the libel ridiculed and vilified the prophets, our Saviour, his disciples, and the sacred scriptures. Being brought up (April 28th, 1798), in custody of the keeper of Newgate, to receive judgment of the Court of King's Bench, Mr. Justice Ashhurst pointed out the enormity of the offence, "The minute parts of which he would forbear to particularize. Although the Almighty did not require the aid of human tribunals to vindicate his precepts, it was nevertheless fit to show our abhorrence of such wicked doctrines, which were not only an offence against God, but against all law and government, from their direct ten-

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It will be seen from the cases, and indeed may be deduced from the general reason of the law, that this libellous blasphemy is understood as affecting only the foundations of the Christian religion, the truth of the holy scriptures, and the acknowledged sacraments of the church. To speak or write irreverently of any of these elements of our faith is libellous blasphemy at common law.

But the law does not prohibit reasonable controversy even upon fundamental subjects, so long as it is conducted with a tone of moderation, which shews that argument is the only purpose; the writer abstaining from language and terms which are abusive and passionate, and, therein, indecorous towards the establishment, and offensive to the consciences of individuals.

What is argumentative may be very properly left to

dency to dissolve all the bonds and obligations of civil society. It was upon this ground that the Christian religion constituted part of the law of the land. But if the name of our Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments. This crime was farther aggravated by the motive in which it was conceived: there could be no temptation, no sudden impulse of passion, to which man was so often exposed by the frailty of his nature: it could have proceeded only from a cool and malignant spirit."

Mr. Justice Ashhurst then pronounced the judgment of the Court, which was, "That the defendant be imprisoned in the House of Correction for one year, there to be kept to hard labour, and that, at the expiration thereof, he shall give security to the amount of 1000*l.* for his good behaviour for the rest of his life."

Lord Kenyon said, that the sentence was light, very light indeed, considering the nature of his offence, which was horrible to Christian ears. He had known a case of less enormity, where the defendant was sentenced to three years imprisonment.

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be replied to by argument; what is passionate, and therein a disturbance of the proper oconomy of the state, cannot be so safely passed over to a defence by similar weapons.—Such a sufferance would be the endurance of brawls. When the law is moved against such writers, it is not persecution: it is a defence of the public tranquillity and decency.

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CHAP. III.

OF LIBELS AGAINST MORALITY AND THE LAW OF NATURE.

The next great rule of human conduct is morality, or the law of nature. This is the great unwritten law of mankind, having God for its origin, human reason for its interpreter, and the maintenance of the general society of the human race for its end.

Its obligation, therefore, is at once in its authority, as proceeding from our common Parent and supreme Sovereign, and in its end, inasmuch as it conduces to the happiness of the particular and general condition.

The common law, therefore, looks with a filial eye upon what it acknowledges to be its own trunk. The law of nature, as we have said, is necessary to society, and society, therefore, must maintain it. This is the reason of the English law in prohibiting and punishing all open and public immoralities, obscene writings, speaking, and exhibitions, the tendency of which is evidently to poison the springs and principles of manners, and disturb the peace and economy of the realm.

Offences of this kind, however, must be *ad commune nocumentum.* Private immorality, or vice, without

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public example, and terminating in the individual, is left to a more solemn reckoning.

It is, however, a general maxim, that an indictment at common law may be supported for any offence which is against public morals, decency, and good manners.

1. Of obscene exhibitions[f]—

2. Under this head of obscene exhibition, may be comprehended every species of representation, whether by writing, by picture, or by any manner of sign or substitute, which is indecent and contrary to public order and natural feeling. It will be sufficient merely to abstract a few of the leading cases under this head, inasmuch as the punishment of such offences, in the light of nuisances and misdemeanors, is within the course of daily practice[g].

[f] *King* v. *Sir Charles Sedley*.—The defendant was indicted at common law for several misdemeanors against the king's peace, and which were laid to the great scandal of Christianity, and detriment of public morals. The offence consisted in his exhibition of his naked body in a balcony at Covent Garden to a great multitude of people, and there doing such things, and speaking such words, &c. (mentioning some particulars of his misbehaviour) as throwing down bottles, &c. amongst the people. *Keeble Rep.* 720, *pl.* 95.

The indictment was openly read to the defendant in court, and the judges told him, that notwithstanding there was not then any star-chamber, yet they would have him know that the court of King's Bench was the *custos morum* of all the King's subjects. 2 *Str.* 790. After he had been kept in court from Trinity term to the end of Michaelmas by recognizance, the Court required him to take his trial at bar; but being advised, he submitted himself to the Court, and confessed the indictment. He was fined 2000 marks, imprisoned for a week, and bound to his good behaviour for three years. 15 *Ch.* II. 1663; *K. B. Sid.* 168. *pl.* 29.

[g] One Hill was indicted for printing some obscene poems of Lord Rochester, tending to the corruption of youth, and the injury of morality.

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It is unnecessary to collect cases on this head: the punishment for obscene writings, prints, &c. has become frequent in the present period, and no objection

He went abroad, and was outlawed. 10 *Will. III.* 1698; 2 *Str.* 790, *King* v. *Hill*.

In Michaelmas term, 1 G. II. an information was exhibited by the Attorney-General against the defendant Edmund Curl, for that he, "being an evil-disposed and wicked man, and wickedly contriving and intending to corrupt the morals of the subjects of this kingdom, impiously and wickedly printed and published, and caused to be printed and published, a certain filthy, wicked, and obscene libel, intitled '*Venus in the Cloister*;' or the '*Nun in her Smock*,' (setting out the several lewd passages) to the bad example," &c. Of this information the defendant was found guilty, and it was moved in arrest of judgment. That however, the defendant might be punishable for this offence in the spiritual court, as an offence against morality, yet it cannot be a libel for which he is punishable in the temporal courts. That *libellus* (the term given to the offence) was a diminutive of the word *liber*, and that it is *libellus* from its being a book, and not from the matter of its contents. In the case *de famosis libellis*, Lord Coke says, that it must be against the public, or some private person, to be a libel. Whatever tends to corrupt the morals of the people ought to be censured in the spiritual courts, to which properly all such causes belong.

The counsel, in arrest of judgment, further contended, that in the reign of Charles II., when there was a filthy run of obscene writings, there was no prosecution to be met with in the temporal courts. In the case of the *Queen* v. *Read*, 6 *Ann*, *B. R.* there was an information for a libel, in writing an obscene book, and after conviction it was moved in arrest of judgment, that this was not punishable in the temporal courts; and the opinion of Holt, C. J. was so strong with the objection, that the prosecutor never thought fit to stir it again.

The Attorney-General, Sir Philip Yorke, *contra*, insisted that this was an offence at common law. It is not pretended that there is any other way of punishing the defendant. It tends to corrupt the morals of the King's subjects, and is against the peace of the King. Peace includes good order and government, and the public peace may be broken in many instances without actual force. As to morality, destroying that, is destroying the peace of the government, for government is no more than public order, which is morality. Every immoral act is not indictable, such as telling a lie, or the like; but if it be destructive of morality in general, if it does, or

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has at any time been made to the jurisdiction of the temporal courts over the offence, as a misdemeanor at common law.

may, affect all the King's subjects, it is then an offence of a public nature. This court is the *custos morum* of the King's subjects. And, upon this foundation, there have been many prosecutions against the players for obscene plays, though they had interest enough to get the proceedings stayed before judgment. 3 *Vol. St. Trials, Lord Grey's case.*

The Court was some time in doubt whether it was an offence to which the common law could extend their cognizance; but, after taking a term to consider of it, they gave it as their unanimous opinion, that this was a temporal offence The defendant was afterwards set in the pillory. 2 *Strange*, 792.

Hil. Term, 4 *G. III.* 1764. An information was exhibited this term by the Attorney-General against the defendant, John Wilkes, for printing and publishing a certain malignant, obscene, and impious libel, intitled an "*Essay on Woman*," tending to vitiate and corrupt the minds and morals of his Majesty's subjects; and to introduce and diffuse amongst the people a general debauchery and depravity of manners, and a total contempt of religion, modesty, and virtue. Of this offence the defendant was convicted, and, upon not appearing to receive judgment, he was outlawed as in the ordinary cases of convictions upon informations for misdemeanors, 4 *Burr.* 2527.

In the case of the *King* v. *Wilkes*, in which the popular feelings were much engaged, and the most eminent counsel concerned for the defendant, no attempt was made to arrest the judgment, upon the pretence that the publication of an obscene book was no libel at common law. Accordingly, for printing and publishing the "*Essay on Woman*," Mr. Wilkes was sentenced to pay a fine of five hundred pounds, to be imprisoned twelve months, and to give security for his good behaviour for the space of seven years, with sureties. 4 *Burr.* 2530.

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CHAP. IV.

OF LIBELS AGAINST THE LAW OF NATIONS.

If it be incumbent on the magistrate to restrain all such disorders of speech or writing as have a tendency to disturb the peace of families and individuals, still more essential is it to repress such excesses as might eventually lead to embroil nations, and thereby bring upon society that greatest of all evils, national war.

Nor will this exercise of his prudence interpose with any useful quality of history. In all cases of this kind, the first inquiry will be as to the motive, and the next, whether the great interests of mankind, that is to say, the truth and honest fearlessness of history, do not furnish a more than sufficient counterpoise against any evil immediately to be dreaded. In the latter case the laws of England will act worthily of themselves; the interests of truth are eternal; the possible evils of an unjust resentment are either transitory, or to be born as a matter of duty.

The law of nations is part of the municipal law of every state. *7 Anne, c.* 14.

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Few cases have occurred under this head, but they are sufficient to give the rule[h].

[h] The Attorney General, by command of the Crown, had filed an information against the defendant, *Charles Genevieve Louis Augustus Andrew Timothy D'Eon de Beaumont*, for a libel on the *Count de Guerchy*, the French ambassador *then* residing at the British court. The libel principally consisted of some angry reflections on the public conduct of the Count, charging him with ignorance in his official capacity, and of having used stratagem to supplant and depreciate the defendant at his court, *i. e.* the court of Versailles. The defendant was tried, and after proving some facts which were laid by way of inducement to explain and apply the libel, and that the Count de Guerchy was acting in the *present* character of French ambassador; that D'Eon set up a press in his own house; printed, sold, and published the books; and, upon reading to the jury the most exceptionable passages, he was convicted on the information. After the conviction, Lord Mansfield observed to M. Mechel, the Prussian, and other foreign ambassadors attending the court, "That the laws of England paid as high a regard to the functions of ambassadors, and would equally protect them from all insults, as well on their reputation as their persons and property, as the laws of any other country." 1 *Black. Rep.* 515.

An information was filed in the Crown Office, 27 G. III. 1787, against the defendant Lord George Gordon, which charged him with a libellous and seditious publication, contained in two paragraphs which appeared in the *Public Advertiser*, relating to the particulars of a visit paid by Count Cagliostra, accompanied by the defendant, to Mons. Barthelemy, the French *charge des affaires*, enlarging on the merits and sufferings of the Count, and concluding with some severe reflections on the French Queen, as the leader of a faction, and on Count d'Adhemar, the French ambassador, and Mons. Barthelemy, as the insidious agents of the Queen and her party. His lordship was found guilty upon the trial of this information, and was called upon to receive the sentence of the Court of King's Bench on the 28th of January, 1788. Mr. Justice Ashhurst delivered the judgment of their Lordships, and, adverting to the libel on the Queen of France, he observed, "That the object of the publication being to rekindle animosities between the two nations (England and France) by the personal abuse of the sovereign of one of them, it was highly necessary to repress an offence of so dangerous a nature*. Other nations, who do not know how liberty, and particularly, the

* A treaty of commerce had lately been concluded between England and France.

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This branch of the law of libel can only apply to two classes of persons, the sovereigns of foreign states, and their immediate representatives,—ambassadors and public ministers. Independent sovereigns, according

liberty of the press, may be perverted in the hands of designing men, could not believe that such wicked publications could go forth, without the connivance of the state where they were published. And well might they think so, unless the author were dragged forth into public punishment."

The sentence of the court was, that the defendant should pay a fine of five hundred pounds, be imprisoned in Newgate for the space of two years, and afterwards give security for his good behaviour for the term of fourteen years. *King* v. *Lord George Gordon, MS.*

King v. *John Vint.* This was an information against the defendant, filed by his Majesty's Attorney General, for a libel against the Emperor Paul of Russia. The libel was as follows:—

"The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without freight."

This libel was charged in the information to have been published "With the intention of traducing the Emperor of Russia, and of interrupting and disturbing the friendship subsisting between that country and Great Britain, and to the great danger of creating discord between the King of Great Britain and the Emperor Paul." The defendant was found guilty upon the trial. *In K. B.* 40 *G. III.* 1801.

King v. *Peltier, K. B.* 43 *G. III.* This was an information filed by his Majesty's Attorney General against the defendant. The information stated in substance, "That before the printing and publication of the libellous matters and charges after mentioned, there subsisted, and did then subsist, friendship and peace between our Sovereign Lord the King and the French republic; and before, and at those times, citizen Napoleon Bonaparte was, and yet is, first consul of the said French republic, and, as such, the chief magistrate of the same, &c. That the defendant, intending to traduce, defame, and vilify the said Napoleon Bonaparte, and to bring him into great hatred and contempt, as well among the liege subjects of our said Lord the King, as among the citizens of the said republic; and to excite and provoke the citizens of the same republic, by force and arms, to deprive the

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to the nature of their characters, are necessarily subject to, and, in turn, are protected by, the law of nations, and may, therefore, claim, as of natural due, the protection of the municipal law of any state, for their

said Napoleon Bonaparte of his consular office and magistracy in the said republic, and to kill and destroy the said Napoleon Bonaparte: and also, unlawfully and maliciously devising, as much as in him, the said Jean Peltier, lay, to interrupt, disturb, and destroy, the friendship and peace subsisting between our said Lord the King and his subjects, and the said Napoleon Bonaparte, the French republic, and the citizens of the same republic; and to excite animosity, jealousy, and hatred, in the said Napoleon Bonaparte, against our said Lord the King, and his subjects.—(The information then stated the fact of publication, and set out the libel at length; the material passages of which, speaking of Bonaparte, were as follows.)—

"Oh! eternal disgrace of France! Cæsar, on the banks of the Rubicon, has against him in his quarrel the senate, Pompey, and Cato; and, in the plains of Pharsalia, if fortune is unequal—if you must yield to the destinies,—Rome, in this sad reverse, at least there remains to avenge you, a poinard among the last Romans."

And in another part of the same publication, the author says, speaking of Bonaparte,—

"As for me, far from envying his lot, let him same, I consent to it, his worthy successor; carried on his shield let him be elected Emperor. Finally (and Romulus recalls the thing to mind), I wish, that on the morrow he may have his Apotheosis. Amen."

Upon the trial of this information, Lord Ellenborough, who presided at the trial, observed in his address to the jury, "That every publication which had a tendency to promote public mischief, whether by causing irritation in the minds of the subjects of this realm, that may induce them to commit a breach of the public peace, or whether it may be more public and specific, and extending to the morals, the religion, or magistracy of the country, these were all cases of libel. But more particularly (his Lordship added), as in the present case, by defaming the persons and characters of magistrates and others, in high and eminent situations of power and dignity in other countries, inconsistent with amity and friendship, expressed in such terms and such a manner, as to interrupt the friendly relations between the two countries. Every such publication is what the law calls a libel." His Lordship then adduced the case of the prosecution, conviction, and punishment, of Lord George Gordon for a libel on the Queen of

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rights of character and dignity, when assailed by defamatory writnigs. The municipal law is presumed to be the most convenient form of affording them that natural equity to which they have a claim.

With respect to ambassadors *resident* in this country, and representing their respective sovereigns, it would be a great public mischief if they were not protected from libel and slander. And if so much of the law of libel is founded upon a presumed breach of the peace, occasioned by it, between individuals and families, how much stronger is the reason for restraining excesses of this kind, which might involve nations in hostilities.

France, and the recent case of Vint, for a libel on the Emperor of Russia; neither of which cases, he remarked, had ever been judicially questioned. "And, therefore," he continued, "I lay it down as law, that any publication which tends to degrade, revile, and defame, persons in considerable situations of power and dignity in foreign countries, may be taken to be, and treated as a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries."

The jury found the defendant guilty, but he never received, or was called upon to receive, the judgment of the court.*

* Shortly after the trial, war broke out between Great Britain and France.

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CHAP. V.

OF LIBELS AGAINST THE STATE, AND CONSTITUTION.

If the law protects the subject in his rights, and punishes every invasion of them, much more does it protect that system from which all these rights proceed, and by which alone they can be maintained. The state and constitution being the common inheritance, every attack made upon them, which affects their permanence and security, is, in a degree, an attack upon every individual, and concerns the rights of all.

If it be the highest crime known to our laws, to attempt to subvert by force the constitution and state, it is certainly a crime, though of inferior magnitude, yet of great enormity, to endeavour to despoil it of its best support,—the veneration, esteem, and affection of the people. It is, therefore, a maxim of the law of England, flowing by natural consequence and easy deduction from the great principle of self-defence, to consider as libels and misdemeanors, every species of attack by speaking or writing, the object of which is wantonly to defame, or indecorously to calumniate,

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that economy, order, and constitution of things, which make up the general system of the law and government of the country. Opinion is strength, and the good fame of government is necessary to maintain this opinion. The distance is not very great between contempt of the laws, and open resistance to them.

Defamation of this kind is more dangerous, inasmuch as it appeals to the passions rather than to the reason of the multitude; it unsettles the minds of the people, relaxes the authority of the rulers, and impairs the reverence due to the laws.

We have already shewn, that by the Athenian and Roman laws, even under the wisest and most lenient administration, libels and calumny against the state were subjected to the severest penalties, and the authors of them capitally punished.—Sylla made it a part of the crime *lesæ magistatis* to declaim against the public officers; a law which, even in the mild reign of Augustus, was re-enacted, and extended so as to comprehend defamation against private persons.

"Libelling against a private man," says Lord Holt[1], "is a moral offence, but when it is against a government, it tends to the destruction of it. This notion of libelling is as old as the law."

"To be free," says Lord Mansfield[2], "is to live under a government by law. The liberty of the press consists in printing without any previous license, subject to the consequences of law. The licentiousness of the press is Pandora's box, the source of every evil.

[1] Lord Raymond, 418.
[2] 3 T. R. 428, King v. Dean of St. Asaph.

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Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of law, to protect individuals, or to guard the state."

"All governments," says Lord Camden[1], "must set their faces against libels, and whenever they come before a court and a jury, they will set their faces against them. And, if juries do not prevent them, they may prove fatal to liberty, destroy government, and introduce anarchy; but tyranny is better than anarchy, and the worst government better than none at all."

We have already shewn, in a former part of this treatise, the just limits of the liberty of speech, and the freedom of the press; and it is almost unnecessary to observe further, that the above-mentioned restrictions contain nothing in them which contradicts the notion of a due civil liberty.

The constitution of this country, which is nothing but perfect reason, acknowledges in every man a right to set forth a general or individual hardship, and to suggest error even in the highest branch of the magistracy. The constitution, indeed, is too wise, not to acknowledge that the best interest of the state, as of human society at large, is truth. It opens, therefore, a ready ear to honest and useful truth of all kinds, and as it receives this truth from human beings, and therefore can only expect it as mingled up and adulterated with human passions, it will often pardon and overlook a natural warmth for the sake of the fruit which it produces. This is the character of the constitution

[1] Entick v. Carrington, 2 Wils. 275.

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with respect to public libels in good times. But every right has its limits. The right is given by the constitution in so far as it is necessary and salutary for the purposes of reminding kings of their duty and parliaments of their trusts; the right stops at that point, where its exercise would endanger the permanence and due weight of government; that is, where it serves no other purpose than to revive the original anarchy, and to spread disaffection and discord through the state.

All governments are founded, either in fact, or in a fiction, the utility of which gives it the authority of a fact, upon a compact between the people and their governors, in which the former give up all their force and will, all their power and independence, to government; that is to say, they make an absolute sacrifice of the greater part, and they consent to exercise the remainder in certain forms and shapes assigned and marked out by the constitution. It is a principle of the British constitution that it is founded upon a compact of this kind. The will and independence surrendered are vested in the king and two houses of parliament. The political liberty reserved is in such meetings of the people as may be necessary for the purposes of petition and remonstrance with these branches of the legislature. The people have reserved to themselves this right; and every declaratory act of parliament, every resolution of one or both of the two houses upon constitutional points, not merely recognises, but expressly and ostentatiously repeats this right in the people. Every right, however, is necessarily restricted by its utility, or, rather, is necessarily confined and narrowed, when it reaches that extreme point in which it

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becomes mischievous instead of useful. The right of petitioning, and all the liberty of speech and writing which are built upon it, are founded in, and deduced from, the general analogies of the constitution; the right of petitioning is necessarily limited by the principles common to all governments. It is necessary to the safety of every government that the power and will of the governors should not be overawed and overwhelmed. No government could support itself, if a demagogue could come forward every year, and call a meeting to petition government to dissolve itself. The fact, or the fiction, on which government is founded, allows or supposes one primitive and original popular assembly and common suffrage; it allows or supposes that the government was constituted in such assembly, and that, being thus constituted, it became thereafter a fundamental rule and establishment,—that is to say, what we emphatically call a Constitution. Such, therefore, are the limits to the liberty of speech and writing as affecting the nature of the constitution.

Every Englishman has an undoubted right to speak, to write, and petition, within the above limits; but he must not, by loose intemperate speculation, endanger the fundamentals of the constitution; he must not shake what is rooted, nor bring again into discussion, with a view of disturbing, what is settled; he may impute error, and suggest improvement: he may present a memorial, or statement, or a remonstrance; but he must not provoke the passions of the populace to overawe the laws, and recast the system of the state.

As far as is necessary to make truth known, the law

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allows him: and only interposes to controul him where he trespasses beyond the necessity.

All libels, therefore, which tend to degrade and vilify the constitution, to promote insurrection, and circulate discontent through its members,—to asperse its justice, and anywise impair the exercise of its functions; all such writings are termed seditious libels, and are visited with the peculiar rigour of the law.

We shall submit to the reader all such of the leading cases as contain in themselves the principles on which the others depend.

Though Lord Coke cites precedents of the indictment and punishment of libellers so early as the 10 Edward III.[m], there is no modern instance of a prosecution for a libel against the state and constitution, and, perhaps, the reason why this species of libel does not often appear in our reports is, because, in the early times of our history, such libels would have been considered as nearly approaching to treason, as will be shewn in the next chapter. We have a proof of this in the case of Williams, a Barrister, who was indicted, convicted, and executed for high treason, in writing a seditious book, in the 17th James I[n].

[m] 3 Inst. 174.

[n] 2 Roll. Rep. fol. 88, 89, 90.

An information was filed, which charged, that the defendant falsely and maliciously published, uttered, and proclaimed, of and concerning the government and rule of England, and of and concerning the traitors who adjudged King Charles the First to death,—that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. The jury find, that as to the publication of the words (viz.—that the government of England consists of three estates, and if a rebellion

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It has been truly observed, that the wisdom of government is of more importance than the laws; and it has always been felt and acknowledged in the history of the British constitution, that the superintendence of that branch of the legislature, which is more especially

should happen in the kingdom, unless it was against those three estates, it was no rebellion), guilty; but as to any other words in the declaration, not guilty; and for exception in arrest of judgment, it was said that these words may be intended *in mitiori sensu*; that there can be no rebellion against the king, but it must be against the three estates, which are all united to the king, *sed non allocatur*; for by 13 Car. II. c. 1, it is expressed, that both, not either house of parliament, cannot make war against the king under any pretence whatever; and though it be granted that there are three estates as to making laws, there is but one authority as to war, and therefore all indictments of treason are against the crown and dignity. The court supposing that the words tended to set on foot that position upon which the war (levied in 1641 by the two houses against the king) was grounded, were much displeased that the counsel would pretend to defend them, or put any tolerable sense upon them. Ventr. 325—Judgment for the king; and the defendant brought error in parliament. Hilary Term, 29 Car. II. 1677: K. B. 3 Keb. Rep. 841, pl. 6; Ventr. 324, the King *v.* Harrison.

Bedford's Treatise of Hereditary Right was holden to be a libel, though it contained no reflection upon any part of the then government. Michaelmas Term, 12 An. 1711; K. B. 2 Stra. 789; Gilb. Cas. 297, the Queen *v.* Bedford.

One Brewster was a second time indicted and convicted for printing and publishing a libel called the "Phœnix," or the "Solemn League and Covenant," in which it was declared, "that a king abusing his power to the overthrow of religion, laws, and liberties, which are the very fundamentals of this contract and covenant, may be controuled and opposed: and if he set himself to overthrow all these by arms, then they who have the power, as the estates of the land, may, and ought to resist by arms." Hil. Term, 15 Car. II. King *v.* Brewster.

Information for writing a scandalous libel, intitled, "Mercurious Politicus;" the principal scandal was, in reflecting on the State and Constitution, as settled at the Revolution, which defendant represented as the "destruction of the laws of England." He was found guilty, and had judgment of

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appointed to protect the subject from the encroachments of power, was as necessary to the due maintenance of the laws, and the administration of justice, as the independent jurisdiction of the courts, and the functions of juries.

the pillory, and a fine of forty marks. Trin. Term, 5 Anne, 11 Mod. 86, pl. 5, the Queen v. Dr. Brown.

An information was exhibited by the Attorney-General against the defendant, for printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, intitled, "The London Evening Post, from Saturday, September 7, to Tuesday, September 10, 1754, No. 4185;" tending to represent this kingdom in a miserable and wretched state and condition, and with a view to traduce the late happy Revolution, and to suggest that it was an unjustifiable and unconstitutional proceeding; and also to dispute and call in question the settlement and limitation of the succession of the crown of this realm in the present most illustrious family: and to represent the same as illegal and unwarrantable, and to make it be believed that the said late most happy Revolution, and the settlement of the Crown of this realm as now by law established, had been attended with fatal and pernicious consequences to the subjects of this kingdom. Michaelmas Term, 27 Geo. II. 1754, K. B. the King v. Richard Nutt. The defendant was found guilty of this libel; fined 500l.: sentenced to the pillory; and imprisoned in the King's Bench two years*.

An information was exhibited by the Attorney-General against the defendant, for printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, intituled, "A Sixth Letter to the People of England, on the Progress of National Ruin, in which it is shewn, that the present grandeur of France and the calamities of this nation are owing to the influence of Hanover on the councils of England;" tending to traduce the Revolution, and to represent it as the foundation of all those imaginary evils and calamities which he the said defendant would falsely insinuate the subjects of this kingdom did labour under; and also to asperse the memory of King William the Third, and of King George the First; and to represent the public measures which were taken and pursued during the course of their respective reigns, as wicked, corrupt, and fatal measures to this kingdom; and also to asperse, scandalize, and vilify the late King and his administration of the government of this kingdom; and to make it

* See Digest of the Law of Libels, p. 126.

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At a time when parliaments were seldom called together, and the spirit of the people depressed, however admirable the theory of our rights and liberties, the subject felt little of their practical application. It is, therefore, no matter of astonishment, when even the wise law of treason, as established by Edward III. was so frequently broken through and evaded, that the law of libel should, in the same manner, be drawn out and extended beyond its bounds.

thought that the public affairs of this kingdom were in a most unhappy and declining state; and that the subjects of this kingdom were unnecessarily and most intolerably loaded and oppressed with taxes, debts, and subsidies; and also to insinuate that the late King had no concern for the people of England, nor any regard for the interest, honour, or welfare of this kingdom; but that the treasure and riches of this kingdom were misapplied, wasted, and dissipated in support of the electorate of Hanover, and his German dominions.

The defendant was found guilty of this libel; was fined 5*l.*; sentenced to the pillory; and imprisoned three years. Hilary Term, 31 Geo. II. 1758, K. B. MSS. the King *v.* Dr. John Shebbeare.

The King v. *Paine.*—This was an information against the defendant, filed by the Attorney-General, as the author and publisher of a seditious libel, the tendency of which was "to traduce and vilify the late happy Revolution, the settlement of the crown and regal government, as by law established, and also the Bill of Rights, the Legislature, Government, Laws, and Parliament of this kingdom." The libel, likewise, contained many seditious and scandalous reflections upon his present Majesty. This libel was tried before Lord Kenyon and a special jury, who, immediately after a speech from Mr. Paine's counsel, pronounced the defendant guilty, without any address or direction from the judge.

The defendant never appeared to receive the judgment of the Court, and was, consequently, outlawed. 32 *Geo. III. K. B.* 1792, *MS. the King v. Paine.*

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CHAP. VI.

OF LIBELS AGAINST THE KING AND HIS GOVERNMENT.

In our former chapter we discussed the nature of such libels as were immediately directed against the State and Constitution of the realm. In the present and following chapter we shall treat of libels against the King and his government, *i. e.* against the person, title, and authority of the reigning monarch, and the administration of his government by his officers and ministers of state.

It is the policy of the law of England to embody, as it were, the civil government of the kingdom in the person of the first magistrate, and, for this purpose, to invest him with a peculiar sanctity; so that all slander, written or spoken against him, in respect to the eminence of his person and the dignity of his office, contracts the highest guilt of which the crime is capable.

The offence of libel and slander is proportionately more criminal as it presumes to reach persons to whom special veneration is due. The diminution of their credit is a public mischief, and the state itself suffers in their becoming the objects of scorn; not only themselves are vilified and degraded, but the great affairs

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which they conduct are obstructed, and the justice they administer is thereby disparaged.

OF LIBELS AGAINST THE KING.

From the time of Edward the Third to the reign of James the First, few cases are to be found of libels against the monarch or the great officers and ministers of state, though it is well known that during such interval the people were frequently incensed against the proceedings of the court and the corruption of its counsellors. Writing, which was then practised only by a few, was not, as in the present times, the common vehicle of slander; more scandal, perhaps, was propagated by bare words than by writing, and might have been punished by actions of *scandalum magnatum*. But a better solution of this inquiry is, that our courts of justice considered all abuse and invective against the King and his great officers; all slander which interfered with the government of the nation; and all libels which reflected upon the conduct and management of state affairs, as little short of treason and concerted designs for the subversion of the government itself. It is no wonder, therefore, if, in those times, we should find such words and writings charged as acts of treason, which, in our age of improved learning and mildness in the administration of law, pass only for libels,—the overflowings of seditious gall, and the resentments of disorderly and petulant spirits.*

* We are much mistaken if the crime mentioned in the following indictment would be esteemed more than a rancorous libel at this day.

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The King, says Lord Coke, is contained in the act of Westminster the 1st, which punishes the spreaders and publishers of false news, &c. 12 Coke, 13.

The statute law, by certain temporary acts, has in various times of our history subjected this offence to severe penalties.

It is a charge of treason against Sir William Ashton for publishing ballads, &c. charging the King with selling some of his dominions by the advice of his ministers.

Suffolk.—Anno tricesimo primo Henrici Sexti. Willielmus Ashton Miles indictatur pro eo quod ipse et alii, proditorie, diversas billas, et Scripturas, in rythmis et balladis, factas et fabricatas, super ostia et fenestras diversorum hominum posuerunt; recitantes in eisdem, quod dominus rex per consilium ducis Suffolciæ, episcopi Sarum, episcopi Cicestriæ, domini de Say, et aliorum de concilio domini regis existentium,—vendidit regna Angliæ et Franciæ, &c.

In the 17th of Edward the Fourth, Thomas Burdet, of Arrow, in the county of Warwick, Esq. was indicted, and had judgment to be hanged, drawn, and quartered, for compassing and imagining the death of the King. The strongest overt-act of the treason charged in the indictment is the dispersing of ballads which had a tendency to withdraw the popular affection from their monarch.—Thus says the record, "Et ad illud nefandum propositum suum finaliter perimplendum, prædictus Thomas Burdet diversas billas et scripturas in rythmis et balladis, de murmurationibus, seditionibus et proditoriis excitationibus, factas et fabricatas, apud Holbourn, ad Villam Westmonasterii predict,—falso et proditore dispersit, projecit et seminavit, dicto sexto die Martii ac quinto et sexto diebus Maii, dicto anno decimo septimo, ad intentionem quod populi domini regis cordialem amorem ab ipso rege retraherent ac ipsum reliquerent, &c.

In the eighteenth year of the same king we find an indictment begin thus:—

Kanciæ.—Anno decimo octavo Edwardi Quarti. Johannes Alkerter, yeoman, nuper serviens Richardi comitis Warwici et Sarum, a diuturno tempore proponens Statum regis pejorare, et de regimine, &c. quantum in se fuit, proditorie, per diversa verba, nefanda et alia dicta sua venenosa, de diversis murmurationibus, seditionibus, proditorum excitationibus, factis et fabricatis, a gubernatione privare, &c. Ad intentionem quod populi ejusdem regis cordialem amorem retraherent, per discordiam inter regem et populum suum movendam proditorie dixit, &c."

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Writing and printing, "That Edw. VI. was not supreme head of the church, or to compass or imagine, by writing or printing, overt deed or act, to depose or deprive the king, &c. was high treason." This act expired with the monarch.

In either of the two last cases we might be apt to think that the crimes were only trivial, and offences against the statute of Westminster, by which they are punishable by fine and imprisonment only.

In the last case, the offence consisting of bare words only, without any thing reduced to writing, seems to be farther removed from treason; yet the judges thought it not inconsistent with the laws (the security of the kingdom requiring it) to outlaw the offender as a traitor.

In the same year another criminal was indicted and outlawed as a traitor for barely saying that the then last parliament was a very foolish one, and uttering other verbal slanders against some of the King's ministers and councillors, as appears from the following record:—

Kancia.—Anno decimo octavo Edwardi Quarti. Thomas Hever indictatur pro eo quod proditorie dixit, quod ultimum parliamentum domini regis, apud Westmonasterium tentum, magis simplex et insufficiens fuit quam unquam antea; et ulterius quod dominus rex proposuit moram suam infra comitatum Kanciæ trahere, et amorem ligeorum suorum ibidem habere, quia amorem cordialem infra eandem civitatem non habuit, nec in futuro habebit, et quod si episcopus Bathoniensis moriatur, quod tunc immediate Thomas episcopus Cantuarensis, et cardinalis Angliæ, caput suum amitteret, et multa diversimoda verba proditoria de rege quam alia verba malitiosa de dominis suis, tam spiritualibus quam temporalibus.

Ut legatus,—prout patet per Rotul' Session.

London.—Anno nono Henrici Septimi. Thomas Bagnalet alii mortem regis imaginaverunt, &c. Et ad intentionem prædictam quod populi regis cordialem amorem retraheren, &c. diversas billas et scripturas in rythmis et balladis de murmurationibus, seditionibus, et proditoriis excitationibus tam versus regem, quam alios magnates de concilio Suo, proditorie fecerunt, &c. et super ostium ecclesiæ sancti benedicti in Gracious-street, et super le Standard in Cheap, ac super ostium ecclesiæ Pauli posuerunt, &c.

These criminals were for this treason adjudged to be hanged, drawn, and quartered. Thus we see the wise King Henry the Seventh punishing a libel against his councillors as a treason. This monarch, as my Lord Bacon says of him, esteemed it his pride to govern his kingdom by his laws.

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In the reign of Henry VIII. it was enacted, "That it shall be high-treason to wish or desire by words or writing, or to imagine, invent, or attempt any bodily harm to be done to the king, the queen, or their heirs apparent."

The last act necessary to be mentioned is an act of Queen Elizabeth, in explanation of a former act, which declares, "That it shall be high-treason to intend destruction or bodily harm to the queen, &c., or to affirm that the laws and statutes do not bind the right of the crown, and the descent, limitation, inheritance, or government thereof. And whosoever shall, during the queen's life, by any book or work, written or printed, expressly affirm, before the same be established in parliament, that any one particular person is or ought to be

In the 30th of Henry the Eighth we find a Peer of the realm indicted for treason, for words that amount to no more than the slander of ministers, who advised the King: and at the same time another gentleman charged with the like crime for only a verbal censure of that proceeding.

Surrial.—Anno tricesimo Henrici Octavi. Henricus Marchio Exon' proditorie dicebat, "I like well of the proceedings of Cardinal Poole;" and ulterius, "but I like not the proceedings of this realm, and I trust to see a change of the world;" and ulterius, "I trust once to have a fair day upon those knaves which rule about the King;" and, ulterius, "I trust to give them a buffet one day."

Et quod Nicholaus Carew miles, malitiose et proditorie murmuravit et indignatus fuit et dicebat hæc verba Anglicana,—"I marvel greatly that the indictment against the Lord Marquess was so secretly handled, and to what purpose? for the like was never seen." 30 *H.* 8.

These records, more at large, with others of the same kind, the reader may find in Croke Car. from folio 117 to 125. They were collected and consulted by the judges in order to determine whether some foolish and malicious words spoken of the King, by one Pine, amounted to treason or not. Their honesty in settling that such words did not amount to treason is much to be applauded; however, these precedents serve to prove that malignant calumnies and scandalous libels against the King and his ministers were by our forefathers reckoned very high and enormous crimes.

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heir and successor to the queen, except the natural issue of her body, &c., shall, for the first offence, be a whole year imprisoned, and forfeit half his goods, &c."

Upon the demise of Queen Elizabeth all those temporary laws ceased. With a view of security to the Hanover succession, a law was passed,[p] declaring it to be treason to write or print against it. This law, though it is not, we believe, expressly repealed, has happily slept near a century. We shall proceed to a short digest of the principal cases under this head of libel.[q]

[p] 6 Anne, c. 7.

[q] All the justices and barons of the coif, Popham, the Queen's attorney, being present, assembled at Serjeant's-inn, in Fleet-street, concerning a book devised by one Browne, containing divers seditious matters, among which these words were contained with others:—"Every preacher runneth to the Queen now, as though they were to be directed by her to tarry for reformations to be had for matters of the church: if the magistrates will agree, all is well; if they will not they are not of the church, and it is a shame to tarry for them, or for a parliament or proclamation," &c. or to that effect. The question is, whether the party be within the danger of the statute of 23 Eliz. c. 2, made against such as do advisedly, and with a malicious intent, against our sovereign lady, devise and write, print and set forth, any manner of book, rhyme, ballad, letter, or writing, containing false, slanderous, and seditious matter, to the defamation of the Queen's majesty, or to the encouraging, stirring, or moving of any insurrection or rebellion within this realm, or any her dominions belonging to the same, &c.; and held by all that it was a moving of an insurrection, and that it was seditious.

At the same assembly was moved by Sir Edmund Anderson, C. J. of the C. P. that it was found by examination, at the assizes held at Bury St. Edmunds, in the county of Suffolk, in Lent last, that one ——— caused the arms of our lady the Queen to be painted on a post in the church between two pillars; near the arms he procured this sentence to be written, which is in the book of the Revelation, chap. 3, verses 14, 15, 16 —"And to the angel of the church of the Laodiceans, &c. I know thy works, that thou art neither hot nor cold: I would thou wert either hot or cold: therefore, because thou art lukewarm, &c. it will come to pass that

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It will be unnecessary to collect any further cases than those referred to beneath, in which the principle of the law is intelligible and distinct, and the practice has been constant and uniform. Convictions and punishments for seditious libels against the person of the mo-

I will spew thee out of my mouth." What offence this was—in which there was no resolution. Sav. 49, pl. 104.

An information was tried before the Chief Justice Raymond, at the sittings in London, which charged the defendant with printing and publishing an infamous libel, called *Mist's Weekly Journal*, wherein the King's title to the crown was openly struck at, his legitimacy called in question, and the persons of several of the royal family scandalously traduced under borrowed names; by representing King George the First under the name of Merewits, the late King under that of Esreff, the Queen under that of Sultana; and at the same time drawing a beautiful character of the Pretender, in the name of the young Sophi, and setting forth the tyranny and subjection all Englishmen lay under, by representing them under the name of the Persians. The charge against the defendant was, for maliciously and traitorously printing of one of these papers in particular; but the evidence produced was, that he acted merely as a servant to the printer, and his business was only to put down the press; and few circumstances were offered of his knowing the import of the paper, or being conscious of doing any thing illegal. Upon which Serjeant Hawkins took two exceptions in his argument for the defendant; one, that this paper ought not to be thought a libel upon the royal family, because the characters that are here drawn are by no means agreeable to the persons supposed to be represented; but if any thing relating to them, it is entirely opposite to what each is known to deserve:—the other, that the evidence against the defendant by no means comes up to the charge; for the fact is charged to be attended with a malicious and traiterous design, whereas nothing comes out upon the proof, but that it was done through ignorance, and in obedience to his master's authority. But the Attorney-General answered to the first of these objections, that it lies upon the counsel for the king only to shew, that this construction which they have put upon the paper is such as the generality of readers must take it in, according to the obvious and natural sense of it; and if, upon the hearing of the paper read, the jury are of that opinion, they are bound in their consciences to find the defendant guilty. And to the other, the Solicitor-Ge-

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narch have been unhappily frequent within these late years. They explain the general rule of law by an uniform application, but there is no variety in the particular cases which renders them worthy of distinct notice.

There is one case[r], however, which ascertains and fixes,

neral observed, that if they could have given evidence of express malice, this fact would have been treason, within the statute of 6 Anne, c. 7; but as it is, the charge is only for printing and publishing a seditious libel, and consequently the circumstances of malice are entirely immaterial. The Chief-justice accordingly agreed the law to be so; and the jury found the defendant guilty. Hilary Term, 2 Geo. II. 1729. Barnard K. B. 304, the King, v. Clarke.

An information was exhibited this term by the Attorney-General against the defendant, for printing and publishing a certain malicious, seditious, and scandalous libel, intituled "The North Briton, Number 45," tending to vilify and traduce the King and his Government, to impeach and disparage his veracity and honour, and to represent, and to make it be believed, that his majesty's most gracious speech, delivered from his throne to the parliament, on Tuesday, the 19th day of April, 1763, contained many falsities, and gross impositions upon the public, and that his majesty had suffered the honour of his crown to be sunk and prostituted, and the interests of his subjects and allies to be treacherously betrayed; and also to render the King and his Government contemptible and odious; and to excite tumults, commotions, and insurrections; and to violate and disturb the public tranquillity, good order, and peace of the kingdom." Easter Term, 3 Geo. III. 1763, K. B. MSS. the King v. John Wilkes, Esq. The defendant was convicted at the trial.

The like information was exhibited by the Attorney-General against the defendant, for printing and publishing "The North Briton, Number 45." Easter Term, 3 Geo. III. 1763, K. B. MSS. the King, v. George Kearsley.

The like information was exhibited by the Attorney-General against the defendant, for publishing the said North Briton, Number 45, in volumes. Hilary Term, 4 Geo. III. 1764, K. B. MSS. the King v. John Williams.

In both these cases there were convictions and punishments.

The cases of the King v. Almon, and the King v. Woodfall, 5. Burr. Rep. 2661, for selling the Letter of Junius to the "KING," as printed in the Public Advertiser, are the same in principle with the foregoing.

[r] This was an information filed *ex officio* by the Attorney-General, against the printer and proprietor of the Morning Chronicle newspaper, which

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with such admirable precision, the boundaries of the offence of libel against the monarch personally, that we shall conclude the present head by citing it at length.

The law of England regards the person and reputation of the monarch with so much tenderness and

charged, that they "being seditious, malicious, and ill-disposed persons, and being greatly dissaffected to our present sovereign lord George the Third, &c. and to his administration of the government of this kingdom, and most unlawfully, wickedly, and maliciously devising, designing, and intending, as much as in them lay, to bring our said lord the king and his administration of the government of this kingdom, and the persons employed by him in the administration of the government of this kingdom into great and public hatred and contempt, among all his liege subjects, and to alienate and withdraw from our said lord the king the cordial love and affection, true and due obedience, fidelity and allegiance of the subjects of our said lord the king; on &c. at &c. did unlawfully, seditiously, and maliciously print and publish, and cause, &c. a certain scandalous, malicious, and seditious libel, of and concerning our said lord the king, and his administration of the government of this kingdom, to the tenor and effect following, that is to say, 'What a crowd of blessings rush upon one's mind, that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the revolution, the successor of George the Third, will have the finest opportunity of becoming nobly popular;' to the great scandal, &c."

The defendants admitted that the paragraph set out in the information as a libel was published by them in the Morning Chronicle of the 2d October, 1809.

One of the defendants, who conducted his defence in person, wished another paragraph from the same paper to be read by way of explaining the supposed libel. The paragraph now proposed to be read was at a considerable distance from the other, and printed in a different type, and there was some intelligence between the two, of a totally extraneous nature, concerning the arrival and departure of fleets, &c.

The Attorney-General observed, that the paragraph pointed out could only be read *ex gratia*.

Lord Ellenborough—"If there be any parts of the same paper, upon the the same topic with the libel, or fairly connected with it, the defendants have a right to their being read, although locally disjoined from it. I cannot admit any thing totally foreign to the subject of the record to be read, or made applicable to the defence. But passages of the same paper,

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active regard, inasmuch as the constitution limits and controls him in what less wise governments consider as the inseparable prerogatives of sovereignty. The law thus compensates to him the efficient power which it had deemed prudent to withhold, by investing him with a

tending to shew the intention and mind of the defendants with respect to this specific paragraph, must be very material for the consideration of the jury. On the trial of Mr. Horne Tooke for high-treason, the matter was carried much farther. The prisoner was allowed to read in his defence various extracts from works which he had published at a former period of his life, and these the jury were permitted to carry along with them when they retired to consider of their verdict. I am not prepared to say that I should go so far. I entertain the highest deference for the judges who presided on that occasion, and their authority is entitled to the greatest weight; but if the point should ever arise before me, it would become my duty seriously to consider whether such evidence should be admitted. Here, however, I feel no hesitation. The passage alluded to, will deserve more or less attention according to its connection with the subject matter of the libel; but its local situation, and the character in which it is printed, furnish no grounds of objection to its being read."

An extract was read accordingly, which concluded as follows: "the prince has thought it his duty to express to his majesty his firm and unalterable determination to preserve the same course of neutrality which he has maintained, and which, from every feeling of dutiful attachment to his majesty's person, from his reverence of the virtues, and from his confidence in the wisdom and solicitude of his royal father for the happiness of his people, he is sensible ought to be the course that he should pursue. We have no doubt that this assurance of the filial respect in the heir apparent, in not interposing his high influence in the forming of an administration, will be most acceptable to his majesty."

Lord Ellenborough, in summing up to the jury, after commenting upon the weight to be given to this extract, which he thought ought to have been considerable if it had stood near the passage complained of, and they had formed parts of the same discussion, but which was greatly diminished by their distance from each other, and the matters interposed between them, proceeded to say, "The next and most important question is, what is the fair, honest, candid construction to be put upon the words, standing by themselves? Is the passage set out in the information *per se* libellous? The first sentence easily admits of an innocent interpretation.

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superior degree of dignity and personal splendour, in respect and veneration. In no country, perhaps, are the titles of the sovereign more plenary and absolute than in this country, where his prerogative is so anxi-

" What a crowd of blessings rush upon one's mind, that might be bestowed upon the country, in the event of a total change of system!" The fair meaning of the expression, " change of system," I think is a change of political system, not a change in the frame of the established government, but in the measures of policy which have been for some time pursued. By total change of system, is certainly not meant subversion or demolition; for the descent of the crown to the successor of his majesty is mentioned immediately after. The writer goes on to speak of the blessings that may be enjoyed upon the accession of the prince of Wales, and therefore cannot be understood to allude to a change inconsistent with the full vigour of the monarchical part of the constitution. Now, I do not know that merely saying there would be blessings from a change of system, without reference to the period at which they may be expected, is expressing a wish or a sentiment that may not be innocently expressed in reviewing the political condition of the country.—The information treats this as a libel on the person of his majesty, and his personal administration of the government of the country; but there may be error in the present system without any vicious motives, and with the greatest virtues on the part of the reigning sovereign; he may be misled by the ministers he employs, and a change of system may be desirable from their faults. He may himself, notwithstanding the utmost solicitude for the happiness of his people, take an erroneous view of some great question of policy, either foreign or domestic. I know but of one being to whom error may not be imputed. If a person who admits the wisdom and virtues of his majesty, laments, that in the exercise of these, he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous; but it must be with perfect decency and respect, and without any imputation of bad motives. Go one step farther, and say, or insinuate, that his majesty acts from any partial or corrupt view, or with an intention to favour or oppress any individual or class of men, and it would become most libellous.—However, merely to represent that erroneous system of goverment obtains under his majesty's reign, I am not prepared to say exceeds the freedom of discussion on political subjects which the law permits. Then comes the next sentence: " Of all monarchs indeed, since the

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ously limited. But the sober wisdom of our law will not carry even this maxim to the extreme. It does not require us to recognize in the sovereign that excellence and infallibility which belong to no man. The

Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular." This is more equivocal; and it will be for you, gentlemen of the jury, to determine what is the fair import of the words employed. Formerly it was the practice to say, that words were to be taken in the most lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. Now, do these words mean that his majesty is actuated by improper motives, or that his successor may render himself nobly popular, by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But if the passage only means that his majesty, during his reign, or any length of time, may have taken an imperfect view of the interests of the country, either respecting our foreign relations, or the system of our internal policy; if it imputes nothing but HONEST ERROR, without moral blame, I am not prepared to say that it is a libel. The extract, read at the request of the defendants, does seem to me too remote in point of situation in the newspaper, to have any material bearing on the paragraph in question. If it had formed a part of the same discussion, it must certainly have tended strongly to shew the innocence of the whole. It speaks of that which every body in his majesty's dominions knows, his majesty's solicitude for the happiness of his people, and it expresses a respectful regard for his paternal virtues. What connexion it has with the passage set out in the information, it is for you to determine. Taking that passage substantively, and by itself, it is a matter, I think, somewhat doubtful, whether the writer meant to calumniate the person and character of our august sovereign. If you are satisfied that this was his intention, by the application of your understandings honestly and fairly to the words complained of, and you think they cannot properly be interpreted by the extract which has been read from the same paper, you will find the defendants guilty. But if, looking at the obnoxious paragraph by itself, you are persuaded that it betrays no such intention; or if, feeling yourselves warranted to import into your consideration of it a passage connected with the subject, though considerably distant in place, and disjointed by other matter, you infer from that connexion, that this was written without any purpose to

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king, as respects his personal responsibility, can do no wrong. As respects his nature, he can err, and therefore error may be imputed to him.

calumniate the personal government of his majesty, and render it odious to his people, you will find the defendants not guilty. The question of intention is for your consideration. You will not distort, but give them their application and meaning as they impress your minds. What appears to me most material is, the substantive paragraph itself; and if you consider it as meant to represent that the reign of his majesty is the only thing interposed between the subjects of this country and the possession of great blessings which are likely to be enjoyed in the reign of his successor, and thus to render his majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If, on the contrary, you do not see that it means distinctly, according to your reasoning to impute any purposed mal-administration to his majesty, or those acting under him, but may be fairly construed as an expression of regret, that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men. I will take the instance of a man, who, for a time, administered the concerns of this country with great ability, although he gained his elevation with great crime: I mean Oliver Cromwell. We are, at this moment, suffering from a most erroneous principle of his government, in turning the balance of power against the Spanish monarchy in favour of the House of Bourbon. He thereby laid the foundation of that ascendancy which, unfortunately for all mankind, France has since obtained in the affairs of Europe. The greatest monarchs who have ever reigned, monarchs who have felt the most anxious solicitude for the welfare of their country, and who have in some respects been the authors of the highest blessings to their subjects, have erred. But could a simple expression of regret for any error they had committed, or an earnest wish to see that error corrected, be considered as disparaging them, or tending to endanger their government? Gentlemen, with these directions the whole subject is for your consideration. Apply your minds candidly and uprightly to the meaning of the passage in question; distort no part of it for one purpose or another; and let your verdict be the result of your fair and deliberate judgment.

Verdict—Not Guilty.—*Rex* v. *Lambert & Perry; 2 Camp. N. P.*

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CHAP. VII.

OF LIBELS AGAINST THE KING'S GOVERNMENT.

An investigation of the conduct of public characters has been long assumed as the peculiar right of the British press. It has been said by Hume, that this liberty arose with the Revolution, and that, as our right is founded on this liberty, so will our liberties be lost with this right. There is perhaps too much point in this remark. It is certain, indeed, that the exercise of this liberty became frequent after the Revolution, but it was always to be found in the principles of the consitution.

Every Englishman has a clear right to discuss public affairs freely, inasmuch as, from the renewable nature of the popular part of our constitution, and the privilege of choosing his representatives, he has a particular as well as a general interest in them. He has a right to point out error and abuse in the conduct of the affairs of state, and freely and temperately to canvass every question connected with the public policy of the country. But if, instead of the sober and honest discussion of a man prudent and attentive to his own interests, his purpose be to misrepresent, and find a handle for faction; if, instead of the respectful language of complaint and decorous remonstrance, he assume a tone and

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a deportment which can belong to no individual in civil society; if, forgetting the wholesome respect which is due to authority, and to the maintenance of every system, he proposes to reform the evils of the state by lessening the reverence of the laws; if he indiscriminately assign bad motives to imagined errors and abuses; if, in short, he use the liberty of the press to cloak a malicious intention,—to the end of injuring private feeling, and disturbing the peace, economy, and order of the state; the law, under such circumstances, considers him as abusing to the purposes of anarchy what it has given him for the purpose of defence.

The law, in this respect, follows only in the line of our duty.

Invective, and the assignment of bad motives, can evidently answer no good purpose. No man can justify such contumely even towards a private individual, and society at least should have dignity enough to communicate something of its sacredness to its officers.

The right claimed by the press, to examine and censure the conduct of public men, is partly made up of the natural right of thinking and speaking, and is a peculiar right, expressly recognized by the British Constitution, under the form of petitioning. The limits of this right we have before marked off and defined.

It is a very great aggravation of a libel, says Hawkins, that it tends to scandalize the government, by reflecting on those who are entrusted with the administration of public affairs, which does not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also has a direct tendency to breed in the people a dislike of

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their governors, and to incline them to faction and sedition.—*Hawk. Pl. Cr. cap. 73.*

Our constitution was not formed at once, and therefore was not understood at once. The full extent of what we have all along been terming the liberty of the press, was not always in the contemplation of courts of justice, and, in violent and tyrannous reigns, a style of writing and speaking, which since the Revolution would only be deemed fair discussion, has been frequently visited with the severest vengeance of the law. This was particularly the case in some of the judgments of the Star Chamber in the commencing years of the reign of Charles the First. But the tyranny of the punishment must not be carried to the credit of the crime.

Having in the first book of this work clearly shown the ancient existence of the law of libel as part of the criminal law of the land, we must not now be considered as surrendering any part of this allegation, by the act of commencing our precedents of the present received notion of libel, as applying to this species of it, from the Revolution.

The truth is, that these public and free discussions would have been considered as direct treason in the early part of our history, as we have already shewn they were so considered, when they contained reflections on the King's authority and government. And in respect to the cases which occur in the Star Chamber, the punishments for the most part were so beyond the natural measure of the crime, that they have passed, and perhaps very justly, into examples of terror, instead of precedents of doctrine.

The cruel sentences passed on Dr. Leighton, Prynne,

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Burton, and Bastwick, by the Star Chamber, before its dissolution, are only remembered with horror by the historian, and are totally disregarded by the lawyer.

The light of the Revolution spread through the whole body of our laws and manners; it gave men a just notion of what society required, and what it could permit; of the extent of law, and of the compass of liberty.

Of the founders, indeed, of the Revolution may be said, without flattery, what was said by the most celebrated historian of his age of certain Roman Princes, with a great deal:—"*Res olim insociabiles miscuerunt, imperium et libertatem.*"—TAC.

We shall now proceed to select some of the principal cases in this branch of the law of libel, upon the reason and principles of which the rest depend.[a] We shall commence from the Revolution, until the period of Lord Mansfield's retiring from the court of King's Bench.

[a] *The King* v. *Beare.*—The defendant was indicted at Exeter, in Devonshire,—for that he, 7 Will. III., at B. in Devon, composed, made, wrote, and industriously collected many false and scandalous libels against the King, and tending to subvert the government of these realms. He was found guilty, fined 500 marks, and ordered to appear at the assizes at Exeter, with a paper denoting his offence, but on the last day of the term his fine was remitted to 100 marks. 10 Will. III. 12 Mod. 221; Lord Raym. 418.

The King v. *Lawrence.*—An information was filed against the defendant for a treasonable and seditious libel against the King and the government, which was contained in a letter to Sir John Pigot, desiring him "to moderate his zeal, for that the King, *innuendo*, King James the Second, would be soon restored; and that for further satisfaction herein, he would soon hear that many lords would repair to him in France," &c. Being found guilty on the trial, he was fined 20 marks, and committed till payment, 11 Will. III. 12 Mod. 311.

The Queen v. *Fitzgerald.*—The defendant being convicted of a scandalous libel, was sentenced to pay a fine of 100 marks, and to go to all the courts of Westminster with a paper in his hat.

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After the death of Lord Mansfield, and upon the succession of Lord Kenyon to the office of Chief Justice of the court of King's Bench, the prevalence of

In Chancery he behaved himself insolently, for which reason the court increased his punishment by imprisonment. 1 Anne, 1702, Q. B. Salk. 401.

The Queen v. *Brown.*—The defendant was convicted of a libel against her Majesty, the government, and the administration of the state; the libel was intituled, "The Country Parson's Advice to my Lord Keeper." 5 Anne, 1706, 11 Mod. 86, pl. 5.

The Queen v. *Bedford.*—We have already cited this case in a former chapter. It was, however, not only a libel against the general state and constitution of the government, but likewise against the reigning sovereign and her administration. The defendant being found guilty of writing, printing, and publishing a scandalous and seditious libel, intituled, "The Hereditary Right," &c. the court gave judgment that he should be fined 1000 marks, be imprisoned three years without bail or mainprize, and, upon his delivery, find four sureties in 5,000*l.* for his good behaviour during life; and that upon a certain day he was to be brought up, and shown to all the courts sitting in Westminster-Hall, with a paper in his hat, expressing the crime and the judgment. The ignominious part of the judgment, the defendant being a clergyman, was remitted by an authority under the privy seal, signed by the Queen. Gilbert's Cases, 297, the Queen v. Bedford.

The Queen v. *Tutchin.*—The information set out that the defendant, being a seditious person, &c. &c. and wickedly and maliciously devising the government and administration of justice under our lady the Queen, her ministers and officers to bring into suspicion and the ill opinion of her subjects, did falsely, seditiously, and scandalously write, compose, and publish, and cause to be written, composed, and published, a certain false, malicious, seditious, and scandalous libel, intituled, "The Observator," &c. The information then set out the libel.

The defendant, who had the assistance of the most able counsel, and was supported by a political party, contended that the papers were innocent publications, and that they could not be libels, because they did not reflect on particular persons.

Lord Holt.—"They say that nothing is a libel but what reflects on some particular person. But this is a very strange doctrine, to say that it is not a libel *reflecting on the government;* endeavouring to possess the people that the government is mal-administered by corrupt persons that

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certain political opinions in Europe rendered the press more licentious and dangerous than ever. Lord Kenyon, a man rigid only on the side of virtue, and

are employed in such stations, either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If men should not be called to account for possessing the people with an ill opinion of the government, no government can subsist." Holt's Rep. 424. St. Trials, Vol. V. 527.

The defendant being convicted of publishing a seditious sermon, was fined 300*l.* ordered to stand upon the pillory twice, and to find security for his good behaviour during life, himself in the sum of 1,000*l.* and two sureties in 300*l.* each. 5 Geo. I. 1719, K. B. the King *v.* Bliss, clerk. *See Digest of the Law concerning Libels*, p. 122.

The defendant being convicted of printing and publishing a libel, intituled "Hog's Journal," was sentenced to stand upon the pillory thrice, and to be committed to Bridewell for the space of six months, and to be kept to hard labour. 2 Geo. II. 1729, K. B. *Same*, p. 124, the King *v.* Clarke.

The defendant being convicted of the like offence, was ordered to be brought to the door of the court in Westminster-Hall (the court then sitting there), with a paper upon his head, denoting his offence, and to be kept to hard labour in Bridewell for the space of one month. K. B. the King *v.* Carter, 2 Geo. II. 1729.

The defendant being convicted of the like offence, was adjudged to stand upon the pillory twice, and to be kept to hard labour in Bridewell for the space of six months. Same term, the King *v.* Knell.

The defendant being convicted of the like offence, was committed to the custody of the keeper of the House of Correction at Bridewell; to be there whipped, and kept to hard labour for the space of six months. Same term, K. B. the King *v.* Anne Walker.

The above libels were of the class concerning which the present chapter treats.

We have thought it proper to cite some of the above cases, chiefly with a view of marking the injustice of the objection which has been made in the present times, of an unnatural rigour, and unprecedented severity, in the sentences recently passed by the courts of justice on convicted libellers.

The King v. *Franklin.*—This was an information against the defendant, filed by the Attorney-General, for printing and publishing a libel, intituled "A Letter from the Hague," in the Craftsman, of 2d January, 1730. It was

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who revered no authority equal to that of the laws, supported the interests of public and private quiet by his decisions from the bench, and opposed, as far as in

tried in the King's Bench before Raymond, Lord Chief Justice. As this publication was attributed to Lord Bolingbroke, and is positively stated to have been written by his Lordship in *State Trials, Vol. IX* 276, the prosecution was pressed forward with the whole weight of government, and resisted, in the same manner, by the party opposed to the court. It was, in fact, a trial of strength between the ministers and their political rivals.

It may be proper to give this trial at some length, as it contains the arguments and opinions of some of the greatest ornaments of the profession of the law with respect to the offence of libel. The information stated, "That a treaty of peace having been concluded between his Majesty George the Second, and the Kings of France and Spain, &c.; and that the defendant well knowing the premises, &c.; and contriving to disturb the happy state of the public peace, and the tranquillity of the kingdom, &c., and to bring his present Majesty's treaty of peace into contempt and disgrace; and also to detract, scandalize, traduce, and vilify the administration of his present Majesty's government of the kingdom, and his principal officers and ministers of state; and to represent them as persons of no integrity or ability, and as enemies of the public good of the kingdom, &c." The information then proceeded to the publication of the libel, and set out the libellous matter, which was to the effect of the above allegations.

The defendant's counsel were Mr. Fazakerley and Mr. Bootle. After the evidence had concluded on the part of the crown Mr. Fazakerley offered to prove some of the contents of the libel to be true. He was immediately interrupted by Lord Raymond.

Lord Chief Justice.—"As for your saying that you can prove what is charged on the defendant to be true, it is my opinion, that it is not material whether the facts charged in a libel be true or false, if the prosecution be by indictment or information; and that writing and printing may be libellous, though the scandal is not charged in direct terms, but only ironically." His Lordship added, "even a private man's character is not to be scandalized, either directly or indirectly; because there are remedies appointed by law, in case he has injured any person, without maliciously scandalizing him in his character. And much less is a magistrate, minister of state, or other public person's character to be stained, either directly or indirectly. And the law reckons it a greater offence when the libel is pointed at persons in a public capacity, as it is a reproach to the government to have corrupt magistrates, &c. substituted by his Majesty, and tends to sow sedi-

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him lay, the progress of the contagion of the times into the feelings and practice of courts and juries. With a just contempt of that popular but dangerous praise,

tion, and disturb the peace of the kingdom. Therefore I shall not here allow of any evidence to prove that the matters charged in this libel are true; for I am only abiding by what has been formerly done in other cases of the like nature.

The observations of Sir Philip Yorke*, in reply to some objections of the defendant's counsel, are so admirable, and explain in a manner so perspicuous and forcible the true grounds and principles of the law of libel, that we shall not think it a digression from the main purpose of this treatise to insert them in this place.

"There was," says he, "another thing mentioned, which was, that if this *Hague Letter* was construed a libel, it would tend to the utter desruction of the liberty of the press. My lord, I am really at a loss to know what sort of a liberty they mean. I hope they do not mean a licentious and unbounded liberty, to libel and scandalize his majesty, or his principal officers and ministers of state, or his magistrates, or even any of the meanest of his subjects, whenever they think fit. Gentlemen, I would have you to know, that even the prerogative of the king is founded upon law, and limited by it, and so are all things relating to his subjects; and it cannot be supposed that a printer only is exempted, and at liberty to use his press for what purposes he pleases. If he is, I desire that the defendant's counsel would point out that law. No; the law is not so absurd as to allow such a liberty of the press. The liberty meant, is to be understood of a legal one. He may lawfully print and publish what belongs to his own trade; but he is not to publish any thing reflecting on the character and reputation, and administration of his majesty, or his ministers; nor yet to stain the character or reputation of any of his subjects. For, as I said before, to scandalize and libel people is no part of his trade; so I say, that it is only that liberty of the press which he is to use, that is *regulated by law, and subjected to it*, and if he breaks that law, and exceeds that liberty of the press, he is to be punished for it, as well as for breaking other laws or liberties. And, gentlemen, though it has been insinuated to you from the other side, that the making of such things a libel, came from the Star-Chamber, yet I must tell you, that printing such defamatory expressions, or slanderous news, was deemed a libel, and punished accordingly, long before the Star-Chamber. It is a law made in 1275, in the third of King Edward the First, intituled, "*An Act that none shall report Slanderous News whereby Discord*

* Afterwards lord Hardwicke, and Chancellor of Great Britain.

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of keeping pace with the liberality of the times, he inflexibly applied the law of the land to all the encroachments of public writers, and would not admit the im-

shall arise." *(Sir Philip Yorke then read the law, for which, vide the Introduction to this Treatise).* So, gentlemen, you see, that this of libel is not a new law, or one that came from the Star-Chamber, but one that has been almost of 500 years standing; therefore I hope you will not suffer yourselves to be amused by such things. The court of Star-Chamber punished without juries; but though juries were taken away, yet the law remained the same as to libels and crimes. So I hope it appears to you to be very plain, that the liberty of the press is limited and governed by law, and that the law sets limits both to the king and his subjects."

The defendant, after a charge from the Chief Justice, who admitted the full force and propriety of the Attorney-General's address, was found *guilty.* The term following he was sentenced to pay a fine of 800l. to be imprisoned for one year, and to find security for his good behaviour for seven years, &c. No arrest of judgment was ever moved for, or writ of error brought upon the record. *State Trials,* Vol. IX. p. 255.

The defendant having been convicted of publishing a scandalous libel, highly reflecting on five several acts of parliament passed in the reign of King George the Second, was fined 200 marks, imprisoned one year, and ordered to be immediately led to all the courts in Westminster Hall, with a paper over his head denoting his offence. *Hil. Term,* 10 *Geo. II.* 1737, *K. B. The King* v. *Nixon.*

The case of *The King* v. *Nutt,* for a seditious libel against the King and his Government, 29 *Geo. II.* 1756, and the case of *The King* v. *Dr. Shebbeare,* for a seditious libel, intituled, "*A Sixth Letter to the People of England;*" 32 *Geo. II.* 1759, *K. B.* have already been mentioned. The latter case was tried before Lord Mansfield, who held the same doctrine with respect to libels against the government, which had been before holden by lord Holt, lord Raymond, and lord Hardwicke.

In the case of *The King* v. *Williams,* for publishing *The North Briton, Number Forty-five;* and the case of *The King* v. *Wilkes,* for publishing the same in volumes; both of which were libels aspersing the honour and veracity of his majesty, and tending to disturb the tranquillity of his government; but there is nothing which occurred in the circumstances of the prosecution, trial, or judgment, worthy of any distinct notice. 5 *Geo. III.* 1765.

In *The King* v. *Almon,* and *The King* v. *Woodfall,* for publishing the Letters of *Junius,* the general docrine of the law of libel was scarcely

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posing name of the liberty of the press to sanctify its licentiousness and protect its abuses. We shall point out

questioned even in the popular harangues of the defendant's counsel; the contest being confined to subordinate circumstances, and turning chiefly upon the then doubtful power of the jury to return a general verdict, and the authority of the court to direct and limit them to the mere questions of the truth of the *inuendoes*, and the fact of publication, &c. We shall have to speak of these cases in another part of our treatise.

The King v. *Horne.*—This was an information filed against the defendant, by his majesty's Attorney-General, on behalf of his majesty, for writing, printing, and publishing two libels.

The first count in the information stated, "That the said John Horne being a wicked, malicious, seditious, and ill-disposed person, and being greatly dissaffected to our said present sovereign lord the king, and to his administration of the government of this kingdom and the dominions thereunto belonging, and wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and excite discontents and seditions among his majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his said majesty's subjects from his said majesty, and to insinuate and cause it to be believed, that divers of his majesty's innocent and deserving subjects had been inhumanly murdered by his said majesty's troops in the province, colony, or plantation of the Massachusett's Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his said majasty's subjects in the said province, colony, or plantation, to resist and oppose his majesty's government, on the 8th day of June, in the 15th year of the reign, &c. with force and arms at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap, wickedly, maliciously, and seditiously, did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning his said majesty's government, and the employment of his troops, according to the tenor and effect following:—" King's Arms Tavern, Cornhill, June 7th, 1775. At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed, that a subscription should be immediately entered into, (by such of the members present who might approve the purpose) for raising the sum of 100*l.* to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's (meaning his said majesty's)

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some of the prominent cases in the court during his lordship's time.

Since the succession of the noble lord who now holds the office of Lord Chief Justice of the court of King's

troops, at or near Lexington and Concord, in the province of Massachusett's (meaning the said province, colony, or plantation of Massachusett's Bay, in New England, in America,) on the 19th of last April; which sum being immediately collected, it was thereupon resolved, that Mr. Horne (meaning himself the said John Horne) do pay to-morrow, into the hands of Messieurs Brownes and Collison, on the account of Dr. Franklin, the said sum of 100*l.* and that Dr. Franklin be requested to apply the same to the above-mentioned purpose. John Horne," (meaning himself the said John Horne) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like cases offending, and also against the peace of our said present sovereign lord the king, his crown, and dignity."

There were other counts in the declaration, charging the said John Horne with causing the same libel to be printed in the London Packet, or New Lloyd's Evening Post, and the Morning Chronicle, or London Advertiser.

The defendant pleaded: Not guilty.

The information was tried at the sittings in London, after Trinity term, 1777, before the earl of Mansfield, by a special jury, and the defendant found guilty of all the offences charged in the information.

The defendant, in person, moved an arrest of judgment, upon the grounds that the information was informal and insufficient. The objections made by the defendant fall under the consideration of another part of this treatise. It will be sufficient to state at present, that the Court refused to arrest the judgment, and passed the following sentence upon Mr. Horne: "To pay a fine of 200*l.* to be imprisoned one year, and to give securities for his good behaviour for three years." Afterwards the defendant brought a writ of error in the House of Lords, but the judgment of the King's Bench was affirmed. *Cowp. Rep.* and *St. Tr. Vol. XI.*

'*The King* v. *Holt.*—The defendant was the printer of the Newark Herald, and was found guilty on two indictments for printing and publishing two libels; the first entitled, an "*Address to the Addressers;*" the second, an "*Address to the Tradesmen, Mechanics, and Labourers of Newark, on Parliamentary Reform.*" He was sentenced for the first offence to pay a fine of 50*l.* and to be imprisoned in Newgate two years; and for the se-

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Bench, the laws of the land have not had to regret any diminution of their vigour, and his lordship has acted up to the example and wisdom of his predecessors, in opposing reason, justice, law, and the practice of our ancestors, to the malicious and spreading innovations of the day.

We shall point out some of the cases which, in this particular branch of libel, have come before Lord Ellenbrough; others will be found under their proper head.*

cond, to pay the like fine, and undergo two years further imprisonment. K. B. M. T. 1793.

In *The King* v. *Winterbottom; The King* v. *D. I. Eaton; The King* v. *Wakefield; The King* v. *Simmonds; The King* v. *Jordan;* and innumerable other cases; the principle in all was the same, that the government of the country must be supported by the laws of the country.

* *The King* v. *Cobbett.*—This was an information filed by the Attorney-General against the defendant, for a libel published in the "*Weekly Register,*" in the form of a letter signed *Juverna.* It was a libel upon the administration of the Irish government, and upon the public conduct and character of the lord lieutenant, and lord chancellor of Ireland. Mr. Cobbett was not the author, but merely the publisher of this letter. After the libel had been proved, and the defendant's counsel heard, lord Ellenborough, in his address to the jury, observed,

"That the law of England was a law of liberty, and, consistently with this liberty, we have no imprimatur: there is no such preliminary licence necessary. But if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it tend to the prejudice of any individual. It is no new doctrine, that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime. It has ever been considered as a crime, whether wrapt in one form or another. The case of *The King* v. *Tutchin,* decided in the time of lord chief justice Holt, has removed all ambiguity from this question; and, although at the period when that case was decided, great political contentions existed, the matter was not again brought before the judges of the court by any application for a new trial." Again his lordship says, "No man has a right to render the person or abilitites of another ridiculous, not only in publications, but if

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Numerous cases may be referred to, in which the same doctrine has been holden by his lordship, and sanctioned by the rest of the bench, in the judgments of the Court upon defendants convicted of public libels. It will be only necessary to refer the reader to the case of *The King* v. *Cobbett*, T. R. K. B. 1810, for a libel, tending to excite disaffection in the army; the cases of *The King* v. *Fisher; The King* v. *Lovel; The King* v. *Gale Jones;* and *The King* v. *Drakard:* there is nothing, however, in these cases to distinguish them from those which we have above cited.

the peace and welfare of individuals, or of society, be interrupted, or even exposed by types and figures, the act, by the law of England, is a libel." And again, "It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the government. But, gentlemen, we must confine ourselves within limits. If in so doing individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation." The defendant was found guilty, but not called up for judgment, having redeemed himself by giving up the author of the libel, who was immediately prosecuted, and convicted. E. T. K. B. 1804, and 7. *East's Rep. The King* v. *Johnson.*

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CHAP. VIII.

OF LIBELS AGAINST THE TWO HOUSES OF PARLIAMENT.

From the dignity of the two branches of the legislature, and their supereminent powers, libels against them have usually been considered as breaches of privilege, and vindicated in the nature of contempts. Their own journals, therefore, are more full of such cases than the reports of the courts of law. The reason of this, however, as above said, results from the dignity of the two houses of parliament, rather than from any defect of the common law. Whenever they have had occasion to direct prosecutions in the courts of common law, for libels upon their members or proceedings, they have uniformly found the same protection which is extended to individuals and more humble corporations[v]. But in order to arrive at a correct no-

[v] *The King* v. *Rayner* was a prosecution for printing a scandalous libel on the lords and commons, for which the defendant was convicted. 2 Barnard, K. B. 293; 6 Geo. II. 1732. See likewise the *King* v. *Stockdale*, which was an information filed by the Attorney-General for a libel upon the house of commons, 28 Geo. III. K. B. See likewise the *King* v. *Reeves*. This prosecution was instituted in consequence of a resolution of the house of commons, declaring a pamphlet, published by the defendant, to be a libel. It was intituled "Thoughts on the English Government;" which

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tion of libels against the two houses of parliament, it will be necessary to enter, at some extent, upon the doctrine of contempts, which, as a genus, includes them all.

The doctrine of contempts, as it lies open to natural reason, and as it has been explained by all our soundest lawyers, may be laid in one principle:—it is the self-defence of a court,—of its moral person and functions. The origin and necessity of it are intelligible in the mere statement. A court cannot begin to act, cannot even enter upon its functions,—unless, by enforcing obedience to its process, it can bring its subject before it. A court may likewise be insulted or obstructed *in ipso banco*. It is necessary, therefore, that a court should have the power of asserting and vindicating its dignity and its jurisdiction, by removing obstructions, compelling obedience to its process, and punishing contempts. It is likewise evident from the mere statement, that this privilege of punishing contempts answers to self-defence amongst individuals, being the defence of the dignity, body, and functions of the court.

The consideration, therefore, of the nature and objects of self-defence will conduct us to the nature and objects of contempts.

Self-defence in an individual embraces three points, —character, personal security, and personal liberty.

contained an expression, "That the King's government might go on if lords and commons were lopped off;" and such other expressions as were deemed libellous by the house. The jury, considering Mr. Reeves as merely metaphorical, and negativing the motives which the information ascribed, acquitted him—36 Geo. III. K. B. In the *King* v. *Stockdale*, the defendant was also acquitted.

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Now a moral person has the same properties, and therefore the same subjects of self-defence. The character of a moral body is its dignity, and the liberty and security of a moral body are the free exercise of its political functions, and the free enjoyment of its political rights.

The first contempts, therefore, and the privileges which are founded upon them, are those which respect the character of the two houses of parliament, and hence it may be laid down as a general principle,

That whatever grossly reflects on the character of a member of either house,—whatever imputes to him what it would be a libel[v] *to impute to an ordinary person, is a contempt, and thereby breach of privilege; it is a direct assault upon his character, and, through the odium presumed to be excited thereby, a consequential obstruction of his political duties.*

To render this subject more intelligible, we will now break this general principle into particulars.

The character of a moral person may be assailed in three ways:—

1st, In the moral reputation of any of its individual members.

The two houses of parliament cannot be supposed indifferent to the moral characters, and the integrity and purity of their members; their purity, at least from all atrocious vices or crimes, is necessary to the due discharge of their peculiar corporate duties, and therefore a part of their moral or corporate person. It is incumbent therefore upon parliament to defend itself

[v] Written imputations, as affecting a member of parliament, may amount to breach of privilege, without, perhaps, being libels at common law.

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from all such imputations which are direct attacks upon its person, and upon its functions—Such imputations therefore are gross contempts, and a direct breach of privilege: whence it may be laid down as a particular rule,

That it is an undoubted breach of privilege grossly to vilify the character of any member of parliament.

The reason of this rule, however, being founded in the general principle of all obstructions, that is, in the tendency of the act to impede, impair, or render nugatory the proceedings of the court, so it must be understood with reference to this reason. The vice or crime imputed must be such, as, by destroying the REPUTATION, may be construed, without force, into impairing the efficiency of his political functions.

With this limitation, there cannot be a doubt that whatever renders the character of a member of parliament infamous, is breach of privilege, as well as libel at common law, and is cognizable both by parliament and the courts of law.

It is necessary, however, to consider an objection and distinction which have been sometimes taken.

It has been demanded, why privilege of parliament should interpose where the act is cognizable by common law? The common law has given a remedy, and more particularly in the case of libels and assaults,—where is the equity, therefore, or where the necessity, that the same offence should be doubly punished, or that, of two possible courses of proceeding, that should be chosen, which takes from the accused the forms of trial,—the security of a known law and a settled jurisdiction?

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To this it may be answered, that it is not contrary to any known rule of law, and certainly not to any maxim of natural justice, that there should be two remedies for the same evil,—and that where the parliament, as a court, and the law, have a concurrent jurisdiction, either, or both, should vindicate its right. It is not two punishments, and each of them equal to the act, for the same offence,—but two punishments for different parts of the offence,—two satisfactions for two wounded interests. Parliament is injured in its privilege,—the law in the public or private wrong. Parliament heal their privilege, and the law takes compensations for its own wrong. Is it not thus in libels at common law? The party has an action for the special damage to himself, and the King an indictment for the injury to the public peace?

In all cases, however, in which these concurrent jurisdictions meet, it is certainly an argument to the prudence and discretion of either house,—and, accordingly, they would always do well to consider, whether in such cases the penal hand of the law be not sufficient, and whether that necessity, in which the anomalous power of privilege is founded, does not cease to exist, where the law is at hand with its sword and its shield.

Self-defence has no place where the matter will wait the coming up of the law: neither reason nor justice will suffer a man to be his own judge and his own assertor, where a better judge and a better assertor are at hand in the presence of the law.—Accordingly, in the cases which follow this attempted developement of principle, it will be seen on reference to them, that, in the best

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times of our constitution; in those seasons in which no extravagant apprehension of plots and dangers has rendered it blind and desperate,—when, all storms of prerogative and civil contest being hushed in their caves, it has fallen down the stream in quiet obedience to its helm; it will be seen that privilege in these times has likewise slept, and, in any casual wrong, has left its watch and duty to law.

This, however, being a most important head of consideration, we shall cursorily observe, that wherever in this concurrent jurisdiction, or rather right of cognisance of the law and privilege, parliament have acted in preference upon their privilege; they have so acted upon, and as it were, established by an almost uniform course, the following distinctions:—

1st, Where the matter has been a gross outrage.—A direct assault, and such, as evidently upon the mere face of it, required a summary vindication and punishment; in this case they have acted upon privilege.

2d, Where the privilege, function, or right offended against, have been matter of general knowledge,—undeniable, and self-evident,—in these cases they have likewise acted upon privilege.

3d, But, where the privilege supposed to be offended against has been matter of argument, and not of evidence,—of dispute, and not acknowledgment,—and the offensive quality of the act itself is in the mere violation of this doubtful privilege,—without any thing superinduced in its manner and circumstances which might bring it within the reach of a more known privilege;—in these cases, both houses have generally carried their complaints to the courts of law.

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4th, In all cases in which either house has been required to act in a double capacity,—that of legislators to declare a doubtful law,—and that of judges to punish upon it,—in consideration of natural equity, they have very rarely acted upon their privilege—they have usually contented themselves with declaring it,—and dismissing the party with a reprimand, thereby avoiding the injustice of an *ex post facto law*, but laying down the rule for the future—On the other hand, where the privilege has been matter of general notoriety and evidence, and they have thus had only one part, that of adjudication or assigning the punishment;—in all these cases they have acted, *ex manifesta re et lege*, on their privilege.

5th, Summarily, therefore, where the act or the rule has been doubtful, so as to require trial or declaration, they have had recourse to law.—Where both act and rule have been matter of notoriety and confession, they have, *even in good times*, acted upon their privilege.

The second way in which the character of a corporate person may be assailed is in its peculiar character as a court, or in the character of any individual member, *as being a member*, of that court or corporation.

Under this head it may be laid down as a rule, *That it is an undoubted contempt and breach of privilege to impute to any member of parliament as such, that he takes bribes, preferments, place, or office, with a view to his particular vote or general conduct.*

Thus it would be contempt and breach of privilege to assert, that either house had decided unjustly or unfairly, in any inquiry, or on any discussion.

It would be contempt likewise and breach of privi-

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lege to tax the house of commons, for example, with any gross act, whether of omission, or commission, with respect to its duties—such as having smuggled a bill,—having miscounted an alledged majority,—having no regard to their constituents, being a mere ministerial assembly, that their seats were bought and sold like so many stands in Mark-lane, &c.

It would be a contempt likewise to burn a member in effigy, for any vote, speech, or conduct in parliament.

A distinction must likewise here be taken between error and corruption,—between the imputation of erroneous policy and corrupt judgment—It is no contempt, because no injury, to impute error, and to discuss the imputation, to any human tribunal, or any individual whatever.—The natural liberty of the people, which is but another name for the liberty of the press, includes within its just compass this right of opinion, of inquiry, and of discussion, provided it be done with temperance and decency.

Any one therefore may discuss the proceedings of the parliament even after they have become final; any one may doubt their wisdom and policy. The mouth of history must not be shut.—There is no legal fiction by which the members of either house are exempted from the frailty of nature, and therefore from the just presumption of error.—The only limits are, that the discussion must not be of a nature so as to obstruct their proceedings, or factiously to call in question their just jurisdiction. To do the latter can clearly answer no good purpose, and being an attack on their vital

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essence is a high contempt, and requires a summary assertion and vindication.

The third way in which the character of a moral person may be assailed is, in its dignity.—This may in fact be considered either as a peculiar quality in itself, or as something superinduced upon character, which aggravates the crime of any offence against it by aggravating the consequences.

With respect to parliamentary privilege, to guard against any error from a too comprehensive rule, it may be necessary to observe in the first instance, that the common law attributes no peculiar dignity to a member of parliament—that is to say, to a member of the house of commons, as an individual, and that the dignity, therefore, which is the subject of privilege, and the subject of defence, is that of the house, and not of the individual person.

There is a well known statute on the books for the defence of the dignity of individual persons: the words of the statute are, lords of parliament and prelates, making no mention of commoners.

When we speak of the dignity, therefore, of parliament, we can intend nothing but the dignity of the body; and all privileges founded on this dignity must be understood to be limited to this sense.

The general rule, therefore, will be—that whatever violates the dignity of the body is breach of privilege, and contempt.

Thus, it is doubtless a contempt to use language of insult or contumely towards either house of parliament.

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It is doubtless a breach of privilege to use such language towards the Speaker—It is doubtless a contempt to caricature or expose to ridicule either the house in a body, or any individual member caricatured and ridiculed *as such.*

Every court or council has necessarily its own proceedings within itself: it has the discretion to open or shut its doors: this is very different from the character of secret tribunals. All courts and all councils are virtually open to the country. In the courts of law the country is present by its jury. In the council of parliament the country is present by its representatives. Either house, therefore, has an undoubted right to withhold its proceedings and speeches from publication.

To publish such proceedings without permission is a clear contempt of privilege.

To publish them against command is a contempt of dignity.

To publish them partially, and injuriously, is both an injury in itself, and a breach of that implied contract which the parties, permitted by the house to take them, have entered into with the house. In both cases, it is an injury which has originated in *facie curiæ*, and is therefore a contempt; and where it is against command, is a contempt of authority, and therefore of dignity.

Contumacy of all kinds, whether in act or words, is a contempt against dignity; but as it falls more immediately under the notions of an assault on the functions of the house, or on that small portion of jurisdiction

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which the law has given the commons, so we shall consider it chiefly under that head.

This leads us therefore to the second main division of injuries to a moral person, and of obstructions or assaults to the being or duties of parliament. These are such as affect its PERSONAL SECURITY.

Under this head, either house of parliament may be attacked chiefly on three points:—

1st, In the safety of its persons, whether of individual persons going to or from the house—or for having exercised any duty or privilege in the house, or with respect to the whole house,—in menacing, overawing, &c.

It is unnecessary to use any words to prove that this is an offence both against law and privilege, and is punishable by both or either according to the election of the party injured.

2d, In its process—it is equally plain that all contumacious disobedience to any orders which the house has a right to give, and more particularly all forcible resistance to its process,—all refusal to attend its committees when summoned,—all withholding or falsification of evidence,—all these are direct attacks on the house in the exercise of its rights, and, by the uniform analogy of law, are all constructive assaults which necessarily put a court upon acting summarily in its self-defence.*

3d, In its jurisdiction; we are speaking of parliament as a body.

If contumacy or resistance to process be an assault

* These observations are meant to apply to *both* houses of parliament.

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upon the house in the exercise of its duties, still more so must be the total denial of its jurisdiction. This has a tendency to cut off its rights and privileges altogether. It will not admit a doubt, therefore, but that all such denial, whether by word or writing, is a direct breach of privilege, and a high contempt,—inasmuch as it tends to subvert all authority of the house, and to arrest it, *in initio*, in the issue of any process or the discharge of any duty.

Under this denial of jurisdiction, may be comprehended,—the appealing to any inferior court in a matter of undoubted privilege;—the putting the two houses of parliament to their law,—to the manifest derogation of their dignity, and interruption of their proceedings.

Under the same head may be comprehended any violation of the privileges asserted in the Bill of Rights, of not being *questioned*, or impeached in a court of law.

As this doctrine, however, if asserted merely in general terms, would be so entirely discretionary, as to become almost arbitrary, it is necessary to subjoin some limitations; the principal of which are,

1. The above rules are not to be understood as restricting the liberty of the press, and opinion, from all inquiries and discussions, whether any alleged privilege or any alleged act be within the jurisdiction, or within the privilege of parliament. This would be a violence upon natural liberty which our constitution does not admit. This liberty, however, must not so far pass its bounds as to deny or dispute, with intemperance and indecency, self-evident and acknowledged constitutional truths, fundamental maxims, and known and

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established law. Such liberty would tend to destroy all liberty,—and dissolve all society. It would be a pure evil,—without any good whatever—a liberty for mischief, and license for ruin. No establishment could stand against it, and the two houses of parliament, having a right to defend themselves against it, have purely a right of self-defence.

Where it is attended with violence and outrage, parliament usually acts summarily in this self-defence. Where the matter is merely libellous without any subsequent act, it usually presents it to a court of law.

2. The second limitation is, that the integrity of the jurisdiction, and the privileges of either house, and their right of not being questioned and impeached, must not so wholly, in matters of penal infliction, preclude all jurisdiction of the King's courts, as to leave the subject totally at the mercy of the house, and of an uncertain law. The judges are bound by their oaths to administer justice according to the law of the land, and it is impossible that they should acknowledge privilege to be law, unless they can take a virtual cognisance of it; unless they can compare any alleged act of it with some rule or notion of it existing in their minds.

The distinction seems to be, that wherever any matter of undoubted privilege comes before a court of law, the court, taking a virtual cognisance of the privilege —that is, acknowledging it as self-evident, but not unnecessarily professing to sit in judgment on it,—dismisses it *instanter*. But in cases where the house have exceeded their privilege, or acted upon a very doubtful privilege, there cannot be a doubt but that the court of King's Bench, or any other court of law, has a power

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to receive the appeal, and might, cursorily as it were, declare an opinion of court, though they should not deem it discreet to act upon it. Parliament certainly may abuse their power and privileges, and such an abuse, when existing in an extraordinary degree, being the abuse of a supreme and unaccountable power, must be without remedy; or at least without other remedy than in the whole legislature. But such extraordinary abuse is rare. The ordinary, and more frequent kind of abuse, is in the transgression of the line of right, and not in a violent departure from, and abrogation of all duty. Our constitution in the other branches of the legislature does not leave this ordinary abuse without remedy. Is it not a fair inference, therefore, that the constitution has made the same provision here? In the first place, by the discreet interposition and declaration of the King's courts, and ultimately, by the dissolution of parliament.

The third main division under which parliament may receive injuries, and be put upon its defence, is its liberty:—this includes any attacks that may be made on the freedom of its members, and of speech. Under all these, however, the rule of privilege is so clear, and the misapplication of any act which may arise so impossible, that it seems unnecessary to enter more at large upon this point. The privileges under this head in modern times have as seldom been abused as disputed.

Such, therefore, considered as the self-defence of a council or court (the only analogy in which it can be considered) seems to be the reasonable and legal compass of privilege and contempt. We shall refer the

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reader to a few select and leading precedents, to prove that both houses of parliament, in good times invariably, proceeded within these lines, and that, even in bad times, when they have trespassed beyond them, they have acknowledged the principle, whilst they have exceeded its extent. Sometimes, for example, stretching the compass of dignity too far, and applying it to an individual, instead of to the house, they have endeavoured to render every libel a breach of privilege, and to derogate from the jurisdiction of the common law, by bringing a case strictly private, immediately and originally before parliament. At other times, not duly regarding the proper line of self-defence, as a summary repulse of violence by power, as a thing granted from necessity, and to be bounded by that necessity, they have acted indiscreetly, if not altogether illegally, in regarding every remote, indirect, petty insult or wrong, an object of this self-vindication: thus forming what no law or reason can ever admit—a doctrine of constructive self-defence, and fictitious contempts.

Contempts, when punished as crimes, must not be grounded on fictions: fictions being allowable to advance equity, but never to work wrong, or originally to create crimes. Where any alleged case, therefore, of breach of privilege is not of direct violence or obstruction,—such as in most cases of libel, and in all those of argumentative denial of any claimed power or privilege, such cases are clearly not within the necessity of so summarily superceding the ordinary course of the law, and therefore, it may be presumed, not within the constitutional reason of privilege. Accordingly, in all such

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cases, the practice of the best times has been to resort to the law.

To say all in a few words, privilege, in good times, like the sword of the Black Prince in Westminster Abbey, has been more honourable in its rust than in its edge—more glorious in its disuse, than in its service; parliament and the people concurring to think it their best praise, that, having so much power, they have used it so moderately. It is necessary perhaps that parliament should have this power, because the time may come when prerogative may call upon them to gird it on their loins. But till that period *shall* come, let it lie quietly upon the surface of the tomb, beneath which, with the Edwards and Henries of ancient times, prerogative as yet sleeps, and if the constitution watch and do its duty, shall still sleep, never to rise again.

The journals of the house of commons are preserved no farther back than the first year of Edward VI. and are very imperfect to the reign of James I. The reader who desires information on this subject must have recourse, therefore, for precedents to the parliamentary rolls. These have been carefully examined, and the leading cases in the early reigns abridged by Mr. Hatsell,—a man, who voluntarily comprehending within the line of his duty whatever might illustrate and adorn the office to which he is attached, is entitled to the praise which belongs to those, who have become benefactors, when they were required only to be servants. The journals of the Lords must likewise be consulted.[y]

[y] For commitments by parliament for libels and contempts, the reader is referred to the cases as follows: In 1529, William Thranur's commitment;

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There are some who admit the house of Lords to be entitled to punish for libels, in the nature of contempts, but deny this privilege to the house of commons.—This doctrine, which so seriously affects the jurisdiction of the house of commons, has been insisted upon with considerable heat, and supported by great learning and ability. The cases to which we have referred the reader in the last note will, we trust, satisfy him upon this point; but there are some questions which they leave still unexplained, and, though not immediately in the course of our inquiry, we shall avail ourselves of this opportunity to examine them.

W. Williams, 1575; Arthur Hall, 1580. *Vide Sir Simon d' Ewes's Journal*, 298. In 1601, *Henry Davis* was taken into custody for a libel. Bryan Tooke committed for contempt of language. In 1628, *Aleyne* committed for a contempt and libel. It is unnecessary to collect cases on this head. They are to be found methodically arranged in a pamphlet on the Jurisdiction of the House of Commons, by W. W. Wynne, Esq. M. P. published by Budd, 1810; and a treatise on the "Law and Usage of Parliament, in Cases of Privilege and Contempt," by the author of the present work, published in 1810, by Reed. See likewise the case of the *Earl of Shaftesbury*, 1 Mod, 144, which was a commitment by the House of Lords. The Earl sued out a writ of habeas corpus, but the Court of King's Bench refused to bail him, acquiescing in the constitutional power of parliament to punish *proprio jure* for the offence wherewith he was charged. Since the Revolution, see the the cases of *Jay* and *Topham*, 1 Will. and Mary, 1689; State Trials, Vol. 8; *Ashby and White*, Lord Raymond, vol. 2, 938; *Paty and others*, Lord Raymond, same volume: the case of the Honourable *Alexander Murray*, 24 Geo. II.; 1 Wilson, 299; the *King* v. *Owen*, 25 Geo. II. 1752, *K. B.*; the case of *Brass Crosby*, 1771; the case of *Flower*, on a commitment by the House of Lords for a libel, 8 T. R. 314. The reader is likewise referred for a more full and comprehensive developement of this subject to the great case of Sir *Francis Burdett* v. *the Speaker of the House of Commons* (Abbot), and the *Same* v. *Earl Moira;* proceedings which grew out of the commitment, by the House of Commons, of J. G. Jones, for a libel upon one of its members, and reflections on the house, in shutting its gallery to the reporters for newspapers. See 14 East's Rep. p. 1.

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It is the object of the present chapter to reduce such cases of privilege of parliament as have occurred, within some system; to form them upon legal grounds, into a kind of theory, which may comprehend their general reason; and, by analogy with more known principles, expound and determine their rules, exceptions, and consequences.

Having now therefore taken a cursory view of the jurisdiction of parliament, in cases of libel, and having marked the compass of privilege which both houses have immemorially claimed, and which the courts of law, when brought before them, have recognised, it now remains to be considered, how far the jurisdiction of the houses of parliament is independent and *per se;* and thereby excludes the controul and cognisance of the King's courts.

This independent jurisdiction, as far as relates to the question before us, is claimed and exercised on parliamentary commitments for contempt and breach of privilege, in the nature of libel; the parliament claiming the right of commitment as grounded in necessity, and an exemption from controul and supervision, or, in other words, an independency of jurisdiction, as grounded on its supremacy.

The independency of the king's courts, with respect to each other, in commitments for contempt, is grounded upon the inconveniency of the jarring and opposition of courts of equal rank. The independency of the jurisdiction of parliament is grounded, *a fortiori*, on a similar reason, and upon the inconvenience and indecency that the acts of a supreme tribunal should be canvassed and controuled by an inferior one.

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Let us look to the objections to this doctrine, which have been summed up in a syllogism.

The right claimed by the house of commons (we are not now speaking of the other branch of the legislature, the house of lords), to imprison for breach of privilege and contempt, exclusive of any controul, or interference of the courts, can be claimed only by virtue of some positive law or custom.

Now there is no such positive law or custom.—*Ergo*—there is no legal ground for their claim.

To this it may be briefly answered,—1st, That the house of commons have this jurisdiction from positive law,—2dly, That they have it by custom,—and, 3dly, What is stronger than either, and what supercedes and supplies them both, the house have it from necessity; from the very nature and elements of their constitution as a supreme court.

1st, The parliament have this exclusive jurisdiction by positive law—*i. e.* by statute declaring and recognising their privileges, and by the judgment of the courts interpreting common law, and thereby rendering it express.

By the statute 4 H. VIII. cap. 8. it was enacted and declared, that all accusements, condemnations, executions, fines, amerciaments, punishments, corrections, charges, and impositions, at any time from henceforth to be put or had upon any member, either of that present parliament, or at any parliament after that atc to be holden, for any bill, speaking, reasoning, declaring of any matter or matters concerning the parliament to be commenced or treated of, beutterly void and of none effect.

Lord Hale's observation upon this clause is:—The

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act of 4 H. VIII. is declaratory of the ancient law and custom of parliament.—The last clause is general,—that is, enacts and declares the general independence of parliament, and of either house, of all other courts whatever.

Again to the same point, the following is a passage from Lord Hale's Jurisdiction of Parliament, and which, having been repeatedly cited by the King's courts, is now received as declared law, and an admitted rule of judgment,—in other words, as express common law.

"Every court of justice has laws and customs for its direction; some by the common law, some by the civil or canon law, some by particular customs. So, the high court of parliament, suis propriis legibus et consuetudinibus subsistit.—Now it is Lex et consuetudo parliamenti, that all weighty matters arising in parliament, concerning the peers or commons in parliament, should be discussed, determined, and adjudged by the court of parliament, and not by any other law used in any inferior court—which was so declared to be concerning the peers of the realm by the King and the lords; *pari ratione* for the commons, for any thing done or moved in the house of commons; and the rather, for that by another law and custom of parliament, the King cannot take notice of any thing said or done in the house of commons, but by report of the house of commons, and *every member in parliament has a judicial place and can be no witness.* And this is the reason that judges ought not to give an opinion of matter of parliament, because it is not to be decided by the common law, but secundum legem et consuetu-

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dinem parliamenti—And every offence committed in any court, punishable by that court, must be punished in the same court, or in some higher, and the court of parliament has no higher." Vide Hale's Jur. of Parliament.

Again, "The lords in their house have power of judicature, and the commons in their house have likewise power of judicature." Vide Plac. Par. 33 Edward, 1 Rot. 33.

Again, "The house of commons is a distinct court."

And again, "Though the parliament err in granting any process, which it ought not, yet this is not reversible in any other court, nor any fault of the sheriff in executing it."

2. These examples and opinions we have produced to prove, that the parliament, and either house (for wherever the common name is used, both or either are intended), have this independent jurisdiction by law.—The same examples might suffice to prove that they possess it by custom.—For we see the lex et consuetudo parliamenti invariably joined together in all our law books, and, by this name, the independency of their jurisdiction is asserted to be both in law and in custom. It is in law for the reason and from the precedents above referred to; and it is in custom, because the common law, which is custom itself, invariably recognises it. It recognises it, moreover, in all the ways by which it can legally recognise any thing: it recognises it positively by certain express judgments of courts, and by the language of the law books received and cited as law; and it recognises it negatively, inasmuch as it never acts against it. What

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would any man require to constitute a custom, but a positive and unbroken recognition of it as a custom by the source of all custom, the common law; a recognition—cœval with the first knowledge, acquaintance and society, which the courts and the chambers of parliament had with each other.

Care must be taken not to confound two kinds of custom, legal custom and parliamentary custom—legal custom has been defined by statutes, and is limited within a certain compass of time;—parliamentary custom is to be sought and to be found only in the records and journals of parliament, and nothing can be averred against it, if it be found there. The record is necessarily the evidence of itself—the thing itself is of necessity a stronger evidence of its own existence than any presumption from prescription—and that surely may be reasonably considered as the custom of any court or body (or, in other words, as a necessary part or element of it), the reason of which may not appear, but is inferred from its long co-existence with the thing to which it is annexed, and which is cœval with the thing itself. Moreover, as the lex et consuetudo parliamenti are only to be judged by themselves, they are necessarily exempt from what the law requires as the legal constituents of its own customs.

There is much controversy as to the antiquity of the house of commons. Prynne and Selden are of opinion, that the house of commons is not visible in our history as a portion of the parliament until about the conclusion of the reign of Henry the Third, and after the battle of Evesham. Petyt, on the contrary, in his celebrated argument on the ancient rights of the com-

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mons, seems to prove, that they began long before this time; and Sir R. Atkins, in his tracts on parliament, strengthens the arguments of Petyt by charters and records, carrying up the existence of the commons, as a part of parliament, to a date much anterior to the Norman Conquest. It is of little consequence to the question before us which of these opinions we may prefer. If the house did not exist in its present perfect form, a co-ordinate part of parliament, and an associate of the house of lords, a distinct but equal branch of the legislature, before the battle of Evesham, it is still certain that the people existed, and that the legislative power, claimed and exercised by the freeholders in some shape or other, was at the least as extensive as at present. At all events, the house of lords, the *Magnum Concilium Domini Regis*, existed; and this is enough for our purpose, inasmuch as, whatever right is claimed by the house of lords in virtue of its parliamentary character, in cases of privilege and contempt, must of necessity belong to the house of commons by the same right and title.

Parliament is to be considered as one body, consisting of lords and commons; granting, therefore, that before the formal junction of the lords and commons in the great council of the kingdom, the commons had no corporate parliamentary existence, it must still be admitted, that, upon the event of this conjunction, this confluence of the two streams, they became one and indivisible in their rights and functions. The lords communicated to the commons all the rights and qualities of their parliamentary nature, and they gained them by adoption, if not by birth.

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By a kind of *lex post liminia* they succeeded to a stock and fund, as if they had enjoyed and possessed it by an original right. When the house of commons became an adopted, received, and acknowledged member of the *Magnum Concilium*, or parliament, they necessarily became invested with all the rights and privileges of the body to which they were appended as a member. They were not tenants in severalty; they were joint tenants. Each house or chamber had not merely its own peculiar share, but an entire and undivided right in the whole. To say all in a word, they became the mere ballotted members, as it were, into a corporation which existed long before them; the character, rights, and privileges of this corporation existed time out of mind; they were inherent in, and appended to its nature, and descended upon all its parts as soon as they came into existence. The chamber of parliament, called the commons, might not exist until Henry III. or Richard; but the grand corporation of the parliament commenced with the monarchy, and necessarily communicated its own nature and rights to whatever it admitted as parts of itself. It seems needless to insist on this head; but if parliament were to appoint a commission of its own members for a certain purpose during the sessions, there cannot be a doubt but that such committee, *quatenus ad rem commissi*, would have all the character and powers of parliament; the right of punishing for contumacy, and committing for contempt.

The privileges of the house of commons are not claimed as a custom from so recent a date as that of the visible body of the house appearing at Winchester

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or Westminster, but they are claimed by a custom necessarily as ancient as parliament itself; as ancient as the *Magnum Concilium* of William the First, and the Wittenagemote of Alfred; as a right of reason, and a privilege of necessity.

Legal custom is one thing—parliamentary custom is another,—and they are to be sought in different places: one in universal usage, the other in the rolls of parliament. It is not pleadable against a parliamentary custom that it has existed since Richard I. If the custom exist in the records, and is there acknowledged as a custom, there is an end of it. Whatever is parliamentary must be tried by itself. Journal must be opposed to journal, and resolutions, votes, and orders, to each other. The question is not, how you choose to interpret them, but what they intended themselves.

Let us now consider cursorily some of the objections to commitments by either house of parliament for contempts.

This jurisdiction, it is said, is contrary to that clause of *Magna Charta*, that no one shall be otherwise imprisoned than *per legem terræ et judicium parium suorum*. Why so? Why is not the right of punishing for contempts a part of the lex terræ? The other courts have always assumed it as such, and exercise it as such; and why should the high court of parliament, or any chamber of the high court of parliament, when acting as a court, whether in council, inquiry, or judgment, be excluded from what is granted to the lowest? Parliament, moreover, as a corporation, was surely cœval with *Magna Charta*, and therefore, whatever naturally belonged to it, must be, impliedly at least, conceived in

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the term *lex terræ*. By the lex terræ nothing more could be intended than the whole body of the common law, and of the process of the common law. If contempts, therefore, belonged to the common law, and they must have belonged to it, they were necessarily included within this general term.

In commenting upon these words, *legem terræ et judicium parium*, many law writers have considered them as alternatives of each other, and in this sense have included contempts in the legem terræ, and assigned trials by jury to the other. This seems an unnecessary nicety;—the conjunction is a copulative; and such a distinction of meaning did certainly not suit the knowledge and character of the era of *Magna Charta*. It is sufficient to translate *legem terræ* by the words common law, and then to understand by that common law whatever the common law necessarily and notoriously comprehends, whether trial by jury or summary process. This summary process is the self-defence of courts, and therefore, not to argue a point which in the very proposition is clearer than any argument can make it, every court must have it; and have it by a stronger authority than that of any positive enactment whatever: by the right of reason, and the supremacy, whether to make or dissolve, of necessity.

A second objection is, that the house of commons is no court of record, and therefore has no right to fine or imprison for libel. To this we might briefly answer, that this is a maxim of law, and not of parliament. It is necessary that courts should have a certain dignity, character, and presumed knowledge, to be intrusted with this power over the person of the subject, and the

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judges have assumed this circumstance of their being a court of record as the qualification to which they give that power; such qualification justifying a reasonable presumption that such courts have the required dignity and knowledge. Now, who will say that a court of parliament is not within the reason of the rule, even if not within the letter? And as common law is a thing of reason, and, not like penal statutes, a thing of letters and syllables, that therefore the parliament, even by common law, would be admitted to have the power in question?

In questions of this kind, however, there is usually a threefold argument;—one from reason, one from fact, and one from authority. None of these is here wanting. We have shewn the reason;—the following is the fact:—

It is not necessary to the summary power of commitment that the courts should be courts of record. All courts require the right and power of self-defence, and therefore all legal courts have it.

The admiralty courts have it.

The ecclesiastical courts have it.

A police-office has it.

A single magistrate has it.

So much for the argument of fact.

Now as to authority.—The house of commons is a court of judicature, and a court of record.—*See 4 Inst. 23 and 47.*

In the statement of the privileges of the house of commons, drawn up by a select committee, viz. Sir Francis Bacon, Sir Edward Sandys, and others, and presented as an address to King James I. is the following claim and assertion:—

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"Concerning the ancient rights of the subjects of this realm, chiefly consisting in the privileges of this house of parliament, the misinformation openly delivered to your Majesty has been in three things:—

"1. That we hold not our privileges of right, but of grace, only renewed every parliament by way of donative upon petition, and so to be limited.

"2. That we are no court of record, but that our proceedings here are only acts and memorials, and that attendance on us with the records is courtesy not duty.

"3. That the examination of the return of writs for knights and burgesses is without our compass, and due to the chancery.

"Against which assertions tending directly and apparently to the utter overthrow of the very fundamental privileges of our house, and therein of the rights and liberties of the whole commons of your realm of England, which they and their ancestors from time immemorial have undoubtedly enjoyed under your Majesty's most noble progenitors,—

"We the knights, citizens, and burgesses of the house of commons assembled in parliament, and in the name of the whole commons of the realm of England, with uniform consent for ourselves and our posterities, do expressly protest, as being derogatory in the highest degree to the true dignity, liberty, and authority of your Majesty's high court of parliament, and consequently to the right of all your Majesty's said subjects, and the whole body of this your kingdom; and we desire that this our protestation may be recorded to all posterity.

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"And contrariwise, with all humble and due respect to your Majesty, against those misinformations, we most truly avouch, that our privileges and liberties are our right and due inheritance, no less than our very lands and goods; and that they cannot be withheld from us, denied, or impaired, but with apparent wrong to the whole state of the realm.

"And that our making request on the entrance of parliament to enjoy our privileges, is an act only of manners, and doth weaken our rights no more than our serving the King for our lands by petition, which form, though new and more decent than the old one by *præcipe*, yet the subject's right is no less now than of old.

We avouch also, that our house is a court of record, and so ever esteemed, and that there is not the highest standing court in the land that ought to enter into competition, either for dignity or authority, with the high court of parliament, which may give laws to other courts, but from other courts receive neither laws nor orders."—*Vide Hale's Jurisdiction of Parl.*

It is another objection against the process of the house, when it assumes to punish for libels, or other kinds of contempts; that it neglects those formalities which are observed in common law;—for example, that it does not proceed on the oath of witnesses, and on the legal rules of trial, but upon summary information, and the confession of the party. The weight which is erroneously given to these objections is founded on the same wrong conception and confusion of two distinct things. The jurisdiction of parliament, like all rights and jurisdictions founded on necessity, and therefore left open by law, is a kind of equity or general reason, which is

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absolved from the rules of law by the condition of its nature, which, not being born of law, does not proceed by law, but, being born of reason, proceeds by reason. Of the rules of law some are merely positive, which are only obligatory because they are commanded by law. Others are the rules of natural equity, as adopted and confirmed by the practice of the courts. The rules of trial, the oaths of witnesses, and all the ordinary forms and ceremonial of courts of justice, are merely positive and arbitrary,—their obligation does not extend beyond their own court and tribunal;—one court may have one form of process, another court may have another. It is a principle of natural law that these forms should be such as should secure the end of natural justice; but it leaves to every court, and to every country, to give to these forms what shape they please, and, amongst many of a similar nature and equivalent efficacy, to make a discretionary selection. Hence one court proceeds by oaths of witnesses—another by wager of law;—one, *ex manifesta-re*, by the evidence of the overt act itself;—another by legal proofs and presumptions,—by the proof of the fact, and by the legal designation of the guilty party.

The forms of courts, the rules of evidence and trial, are the securities which the law takes against the discretion of any individual judge, but are these forms equally necessary when the law acts by its own arm, and as it were in its own person? Can the legislature, or any integral member of the legislature, at once a part and a whole, like the arm of the body, be jealous of itself, and admit that distrust of its own justice, as to put itself under those fetters with which it has invested

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and restrained all inferior courts? All such supreme jurisdictions sit by their own authority, and act upon their own reason;—their patent is in themselves;—their rule of court is in their own judgment;—they are not a legal, but a natural tribunal;—they are not bound by rules of law, which may or may not require certain oaths and process, but they are bound by natural equity, which varies its process and its forms according to the reason of the case.

The house of commons, it is said, cannot examine on oath. Why so? The house of commons can examine on oath, and almost daily does examine on oath;—it examines on oath in election cases;—it examines on oath on committees of various kinds. Where the house does not examine on oath, it is not from defect of right and power, but because it has not used itself so to do. The matters which come before it are seldom of a nature in which oaths are required;—they have seldom any matters of trial properly so called. In all cases of privilege, they have only to decide *ex manifesta-re*. The contempt stares them in the face;—the author of it is designated in the act itself; the house have to adjudicate, and not to try; to give judgment, and not to hear evidence; what is said is not a defence, but a supplication to the mercy of the court. The prisoner is called upon—not to contradict the evidence, for that is past—but to answer the question, what have you got to say why sentence should not be passed? Hence the manner in which the house receives these appeals; that is, without answer on its part, inasmuch as they are appeals to clemency, and rarely defences against the evidence.

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The objection against their warrants, in case of commitment for libels, and other kinds of contempts, as being unsealed, is of the same nature as that against the process, and might be passed over with the same general answer; that the parliament, and every branch of it, is a supreme and not a subordinate tribunal;—that they are bound by the rules of natural equity, and not by those of law, and that natural equity has no positive rules or determinate process; that she is fixed and invariable only in her ends, but that the whole armoury of reason is amongst her means; the staff, the sword, the rod, and the mace—the oath, the affirmation, the honour, and the mere word, without the solemnity of formally affirming. The rules of the courts are what the courts have imposed upon themselves. Surely these inferior courts had no right to impose the same rules on the high court of parliament, or any one of the chambers of this high court. Is it not almost as absurd to argue this objection as to urge it?—The process of the inferior courts belongs to themselves, and extends no further; it is their law, because it is their usage, and their self-imposition. It is neither the usage of parliament, nor have they self-imposed it; they have another usage, and another self-imposed rule;—they have a warrant of their own, trial of their own, and execution of their own.

The parliamentary warrants, moreover, are not within the reason according to which the legal warrants are required to be sealed. The magistrate is required to seal his warrant for two reasons—in the first place to authenticate his act to another officer who is required to act upon it—and in the next place, that in the event of any illegality or oppression he may be called to an-

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swer for it, and instantly convicted on his record; or, in legal language, be estopped from denying it, or requiring further proof of what he is alleged to have done. The law, hating litigation or delay of justice, whenever it acts by itself, always acts to the purpose, and takes a deed or record, an instrument, or an authority, that nothing may be averred against it. The magistrate or court is thus rendered immediately amenable for its act. But the house of commons being in its nature amenable to no one, and all its acts being acts of notoriety, *in facie patriæ populique*, the sealing of their warrants is necessary for neither of the above purposes. In the case of the abuse of the house, the subject has no legal remedy, because the abuse is deemed impossible, and the end not being required, the means (the sealing of the warrant) are not given;—and with respect to the officer, he is officially in attendance, and receives the warrant *ex manu in manum*.

We have considered, in another place, the objection, that a party, punished by parliament for contempt, may be likewise punished at common law, and thus receive double measure for the same offence. Parliament may punish the contempt; the common law punishes the breach of the peace. The offence has two distinct parts or points; it wounds two distinct interests; the parliament cures one—the common law the other. Every offence consists of so many parts as its injury has objects; and every distinct injury requires its distinct satisfaction.

The offences, moreover, punished by parliament as parliamentary, are not generally, *quatenus* their parliamentary nature, punishable elsewhere. The contempts

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against any court are only punishable either in that court, or in some higher court; and many of the contempts are only punishable in the court itself which is the object of them. This is peculiarly the case in parliamentary contempts—the ordinary courts take no cognisance of these contempts, because they know not what they are;—they depend upon the orders, the resolutions, &c. of the house, of which the courts have no legal knowledge and certainty. There are certainly some offences against parliament which are at the same time offences against common law, and here both law and parliament, as above said, will have their distinct satisfactions, or either may refer its vengeance to the other. But where the contempt is merely parliamentary—such as the non-attendance of a member—contumacy of a parole witness at the bar of the house—there is no concurrence of jurisdiction, because no concurrence of injury.

With respect to the peculiar nature of parliamentary commitments, it may be observed, that arrests by command, *ore tenus*, without writing, are not unknown to the common law, and in contempts are very frequent. The Chief Justice, or other Justices of the King's Bench, may command, *ore tenus*, the marshal or any of his deputies to arrest any person, and such command is a good justification in false imprisonment, although there be neither seal nor writing, and although no cause be expressed in the commitment. The legal reason with respect to the Chief Justice or judge is, that the law will not presume any ignorance of his duty or abuse of it in so high an officer; and with respect to the marshal or his deputy, the command is a matter

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of notoriety, and impossible to be assumed or pretended, so as to serve as a cover for violence. The two reasons of writing and sealing failing, the person of the judge being certified in the very act, so as to designate him as the author of it, and the officer receiving the command *ore tenus*, the law does not extend its demands, where they are so evidently unnecessary.

With respect to the alleged uncertainty of the privileges of parliament, we find the whole race of eminent lawyers, from Sir Edward Coke to Blackstone, concurring in one opinion, that the law of parliament, as a kind of general equity, is from its nature undefinable, and, like equity, would lose its effect and utility, if restricted within any letter whatever.—The natural use of it is to meet cases which are of themselves, necessarily, out of the possibility of definition; and the attempt to define which would be to reduce law itself to uncertainty.—A general law is as unnatural as a rigid equity—Whatever, from its nature, must be adminstered by discretion is necessarily *extra regulum;* or to use a legal phrase, equity cannot be ruled, and discretion is no longer such, than, whilst under the ordinary obligations it is left arbitrary.—If any number of rules were laid down, how easy would it be, by the addition of extraneous circumstances, to take every future case out of the compass of such rules.—Privilege therefore may be allowed to shift, and to assume any shape, according as the accidents of the times, and the exertions of its natural enemies, prerogative and popular licentiousness, may require.—To refer privilege to its precedents and adjudicated cases, is to confound things which are different in their nature; to throw equity into the

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chains of law, and to confine reason, when operating upon general principles and in the wide circle of human affairs, within those rules which have been assigned to it, with a wise jealousy, in cases of property and merely civil concerns.

This arbitrariness and uncertainty are the defensive discretions and uncertainties of liberty.—It is a species of independence and loose power which the people through their representatives have reserved to themselves; which is left unassigned to any thing, that it may be fit for every thing; not a waste, but a kind of common, which is always at hand for public use, without interfering with private appropriation or established boundaries.

Having now, as we hope, in some degree, executed the purposes with which we set out,—that is, endeavoured to establish a certain principle and system which might comprehend contempts,—and having produced examples of the several parts of this doctrine,—and in the next place, having cursorily noticed all the objections which fell in our way, we shall briefly take leave of the subject, by expressing our hopes, that nothing will at any time, or in any event, sever the union of the parliament and the people,—that union, without which parliament must lose its power, and the people their protection;—without which, parliament, compelled to seek shelter from the throne, must become, in its own defence, an aristocracy, instead of the council of a free nation; and without which the people, on their parts, must shortly give that submission to the throne, which they refuse to give to their own representatives.—The privileges of the parliament

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are the privileges of the people.—They are claimed and maintained by parliament as the defence of popular rights, and our common liberty.—They arrest the course of prerogative, as well as that of popular licentiousness.—Whence is it but by privilege that the parliament can freely debate and fearlessly decide; that nothing can be introduced to bias or overawe them; that the king, as in the times of Henry VIII. and Elizabeth, can no longer tell them not to trouble themselves with affairs of state, and, as in the reign of Charles, cannot enter and demand the person of an obnoxious member. —These are all indeed rights, but their defence is in privilege; in that summary power which repels and punishes in the instant.—No spectacle can be more monstrous, than when in a popular government the people rise against themselves, and under the impulse of a blind fury, assist to demolish their best bulwarks—that matted and laboriously-composed sea-wall, which the patience of ages has been raising and repairing against the encroachments of an element as much to be dreaded in its sap as in its assault.—Remove the controuls of power, and a generation will not pass away before it will enlarge its bed.

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CHAP. IX.

OF LIBELS AGAINST COURTS OF JUSTICE.

CONTEMPTUOUS words or writings concerning Courts of Justice, or concerning parties engaged in causes therein, with a view of prejudicing judges or jurors, have, in all periods of our law, been visited with exemplary punishment.

As they obstruct the law, and corrupt the very fountains of justice, the wisdom of the constitution has enabled the Courts, who are the subjects of such scandal, with a view to protect themselves and their suitors, to proceed immediately against the offenders by the summary remedy of an attachment.

There are, however, several instances of indictments and information for this species of libel; indeed, one of the earliest cases of libel was an indictment for an offence of this kind.

"Contempts of court," says Hawkins, Pl. Cr. Vol. II. 228, "are amongst the most remarkable instances of *contempt*."

John de Northampton, an attorney of the King's Bench, wrote a letter to Robert de Ferrars, one of the king's council, importing, "That neither Sir William Scott, Chief Justice, nor his fellows the king's justices, nor their clerks, any great thing would do by commandment of our sovereign lord the king, nor of queen Philippa in that place, more than any other of the realm;" which said John being called, confessed the said letter by him to be written with his own proper hand. The judgment of the Court was,

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The nature of contempts has been explained in the preceding chapter, but as they are committed against Courts of Justice, and involved in the general offence of libel and slander, it is necessary to be more particular.

There are different sorts of contempt—one kind of contempt is scandalising the Court itself—the second species of contempt is the calumniation of the parties who are concerned in causes before the Court—the third, is prejudicing mankind against persons before the cause is heard. This is the most aggravated of its kind and dangerous in its consequences, as nothing can be more essential to the due administration of justice, than to keep its streams clear and pure, and to provide that persons should proceed with safety to themselves and their characters.

The original of commitment for contempts of court is derived from the statute *Westm.* 2. cap. 39. It seems indeed to flow as an easy corollary from the power given to the sheriff by that statute to imprison such as resisted process, that the judges who awarded that process must have the same authority to vindicate it.

It is therefore a rule, founded on the reason of the common law, that all contempts to the process of the Court, to its judges, juries, officers, and ministers, when

"And because the aforesaid John hath confessed the aforesaid letter to have been by him written to Robert de Ferrars, one of the king's privy council, which letter is not true: by colour whereof the lord the king may be offended with the court and his justices on that account, and which would tend to the disgrace of the justices and the court; therefore the same John is committed to the marshal, and afterwards to find six securities for his good behaviour." Mich. Term, 18 Edw. III. 1344, 3 Inst. 174. *The King* v. *Northampton.*

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acting in the due discharge of their respective duties, whether such contempts be by direct obstruction, or consequentially; that is to say, whether they be by act or writing, are punishable by the court itself, and may be abated *instanter*, as nuisances to public justice, and subject the party so offending to fine and imprisonment.

Notwithstanding the statute of Magna Charta, that none are to be imprisoned, *nisi per legale judicium parium suorum*, it is one part of the law of the land to commit for contempts, and confirmed by this statute. Gilb. Hist. of C. B. 20, 21.[a]

Discoursing of libels of this kind, Hawkins observes, *Pl. Cr.* Vol. II. 230, "Where persons are punishable in the manner above mentioned (*i. e.* by attachment) for contemptuous words and writings concerning the court, —it seems needless to put any instances of this kind, which are generally so obvious to common understanding, and therefore I shall only observe,—That sometimes attachments have been granted for contemptuous words concerning the rules of court, without making any rule to shew cause why such attachments should not be granted, because it would be vain to serve him with a second rule who despised the first." The doctrine of attachments for contempts has been objected to on some specious grounds, which it may be necessary to examine.

It is said that the courts, in this right of summary commitment, claim to exercise a power which the con-

[a] An admirable exposition of the principles upon which the courts of justice proceed in the punishment of contempts by attachment, is to be found in "Judgments and Opinions of Lord Chief Justice Wilmot,"—*The King* v. *Almon*, p. 152.

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stitution does not allow to the king—but unhappily for this argument, the king has this right and power—all contempts are punished in this summary way in the king's name—contempts of the court, contempts of the king's writs, contempts of the person and authority of the king, in his courts, judges, and process, are all punished in the king's name.

The objects of contempts and summary commitments are courts and judicial persons—The king in his private individual person, is neither a court, nor a judge—when he becomes such in the person of his judges and court, he becomes a legal object of contempts; and contempts against him are then punishable as contempts,—*i. e.* summarily, by instantaneous repulse, and immediate defensive vindication.

The king indeed does not himself commit, because the king does not act in his own person in the execution of justice—but the offender is committed by his court, and for the offence against his justice and authority.

Against what, for example, is the contempt considered as directed? It is punished as against the law and justice of the realm, and this law and justice are constitutionally regarded as embodied and represented in the person of the king; all public justice being his right, as all public injury is his wrong—All contempts, therefore, of whatever kind, are against the king, and punishable only as against him—So absurd is it to allege, that the king has not this right.

There are those who object to attachments as being contrary, in popular constitutions, to first principles. To this it may briefly be replied, that they are the first

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of all principles, being founded on that which founds government and constitutes law. They are the principles of self-defence; the vindication not only of the authority, but of the very power of acting in a court. It is in vain that the law has the right to act, if there be a power above the law which has a right to resist; the law would be then but the right of anarchy and the power of contention. Neither is it sufficient that the law should in this case remove the obstruction only. In no case whatever of a criminal nature is it sufficient to get rid of the mere act. Penal law, and every thing which by its reason is within penal law, is always made up of two things; satisfaction for the present act, and security for the future; in other words, a remedy and a penalty.

In the same manner, in all contempts, it is necessary to remove and to punish; and, by the very nature of the thing, both are united in the remedy of the one; the imprisonment of the person at once abates the contempt and punishes it.

To return to precedents.[b] The cases on this subject are not very numerous. They are sufficient, however,

[b] A libel, published in a newspaper, in the form of an advertisement, reflecting on the proceedings of a court of justice, is, in the language of lord C. Parker, "A reproach to the justice of the nation, a thing insufferable, and a contempt of court." *Vin. Abr. title Contempt*, p. 466. *Pool* v. *Sacheverel*.

A motion was made against the printers of certain newspapers, for the purpose of committing them to the Fleet prison, on account of their having published a libel upon some trustees in the court of Chancery in a matter pending before the court. When the motion came on to be heard, lord chancellor Hardwicke observed, "Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented, nor is there any thing of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before

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to explain the general principles of the law, which acts with a caution and moderation in all its measures. The dignity of justice seems to require that all its proceedings, as far as is consistent with general and individual interest, should be public and notorious; that its doors should be open not only to suitors, but to the public.

the cause is fairly heard. But, notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognisance of it: for whether it be a libel against the public, or private persons, the only method is to proceed at law.

His lordship then cited cases of a similar kind, upon which the court had animadverted, and proceeded as follows:—"The case of Raikes, the printer of the Gloucester Journal, who published a libel in one of the journals against the commisioners for charitable uses at Burford, calling his advertisement *a Hue and Cry after a Commission of Charitable Uses*, was of the same kind as this, and the court in that case committed him."

"There are several other cases of this kind; one strong instance, where there was nothing reflecting upon the court, in the case of captain Perry, who printed his brief before the cause came on; the offence did not consist in the printing, for any man may give a printed brief, as well as a written one to counsel; but the contempt of this court, was prejudicing the world with regard to the merits of the cause before it was heard. Upon the whole, there is no doubt but this is a contempt."

There is one useful observation made by this excellent judge in the case now before us, which ought not to be omitted here, though it belongs to another part of this treatise. "With regard to Mrs. Read (one of the defendants) the publisher of the St. James's Evening Post, by way of alleviation it is said, that she did not know the nature of the paper; and that printing papers and pamphlets is a trade by which she gets her livelihood. But though it is true this is a trade, yet they must take care to do it with prudence and caution; for if they print any thing that is libellous, it is no excuse to say, that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous; and so is the rule of law, and I will always adhere to the strict rule of law in these cases." 2 *Atkins*, 469.

A memorable instance of the exercise of this summary jurisdiction of the court of Common Pleas, for a libel, in contempt of its proceedings, may be here mentioned.

Lieutenant Frye, of the marines, in the year 1743, was sentenced to fifteen years imprisonment by a court-martial. For this most iniquitous

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It is undoubtedly within the natural compass of the liberty of the press, to discuss, in a decent and temperate manner, the decisions and judgments of a court of justice; to suggest even error, and, provided it be done in the language, and with the views, of fair criticism, to censure what is apparently wrong; but, with this limitation, that no false or dishonest motives be assigned to any party.[c]

Any public reflection on the administration of justice is unquestionably libellous.[d]

sentence, he brought an action against the president of the court-martial, and recovered 1000*l.* damages. In pursuance of what fell from the judge who tried the cause, the plaintiff commenced actions against the other members of the court-martial who had passed the sentence, and they were arrested by *capias*, at the breaking up of the court-martial against admiral Lestock, of which they had also been members. This court-martial took upon itself to pass some resolutions reflecting on Sir John Willes, chief justice of the court of Common Pleas, which were laid before the king. Upon this, the chief justice caused every member of the court to be taken into custody, and was proceeding to assert and maintain the authority of his office, when a written, and contrite submission, signed by all the members of the court, stayed the progress of justice. The submission, transmitted to the lord chief justice, was ordered to be read in open court, and to be registered in the remembrancer's office; and it also appears in the London Gazette of 15th November, 1746, "A memorial (as observed by the lord chief justice) to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will, in the end, find themselves mistaken."—*C. Pl. MS.* 1743.

[c] See 1 *Camp. N. P. R.* 359, in which the above proposition seems to be ratified in its full extent by Grose, justice, in *The King* v. *White* and *another*, of which case we shall speak in a following page.

[d] As where one Hurry, having been maliciously prosecuted for perjury by the defendant, and acquitted; and after having recovered large damages, for the malicious prosecution, from one Watson,—the corporation of Norwich, of which he was a member, made an *order in their books*, voting him 2,300*l.* in consideration of the verdict against him, and declaring it was done in consideration of his having been actuated by motives of public jus-

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A fair, plain, and honest account of the proceedings of a court, is not a libel; but a partial and dishonest account, containing reflections upon the parties, which form no part of the subject matter before the court, is a libel, and cannot be justified. Upon this species of defamation we shall have to observe in a subsequen chapter*.

tice, and for preserving the rights of the corporation, and supporting the honour and credit of the chief magistrate. The court of K. B. held this to be a libel on their proceedings and the administration of justice, and made a rule absolute for an information against the defendants. In this case Buller, justice, observed, "nothing can be of greater importance to the welfare of the public, than to put a stop to the animadversions and censures which are so frequently made upon courts of justice in this country. They can be of no service, and may be attended with the most mischievous consequences. Cases may happen, in which the judge and jury may be mistaken; when they are, the law has afforded a remedy, and the party injured is entitled to pursue every method which the law allows, to correct the mistake. But when a person has recourse either by writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is to weaken the administration of justice, and, in consequence to sap the very foundation of the constitution itself."

* 1 Hawk. c. 73. s. 8. *Moulton* v. *Clapham*, Sir Wm. Jones, 431. See likewise March on Slander, 20. S. C.; and *King* v. *Wright*, 8 T. R. 293; *Curry* v. *Walter*, 1. Bos. and Pull. 525.

Publishing a scandalous petition presented to the house of lords, or a scandalous affidavit made in a court of justice, is an indictable offence. *Rex* v. *Salisbury*, 1 L. Raym. 341.

In *Stiles* v. *Nokes*, a case of which we shall have to speak in the following pages, Lord Ellenborough observes, "It must not be taken for granted, that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances, and with whatever motive, justifiable; but that doctrine must be taken with grains of allowance." 7 East. Rep. 503. In the same case, his lordship further observes, "It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry, are very distressing to the feelings of individuals on whom they reflect; and if such circumstances were afterwards *wantonly* published, I should hesitate to say, that

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It is said to be libellous to publish the preliminary examinations taken *exparte* before a magistrate, previous to committing a man for trial, or holding him to bail, for an offence with which he is charged; the tendency of such a publication being to prejudice the minds of jurymen against the accused, and to deprive him of a fair trial; *The King* v. *Fisher*, 2 Camp. N. P. 563. In the case from which the reporter collects this doctrine, the matter of the libel was not, however, a faithful, *exparte*, report; it contained defamatory reflections, and conclusions drawn by the writer himself, not warranted by the proceedings before the magistrate. The rule, however, taken in the extent stated, is extremely salutary.[f]

such unnecessary publication was not libellous, merely because the matter had been given in evidence in a court of justice."

[f] *Rex* v. *Lee* and *another*.—This was an information filed by the Attorney-General, against the defendants, who were the printers of the Sussex Journal, for publishing three several accounts in that newspaper of a transaction in which a smuggler had been shot by an excise officer of the name of Bignold, who had been committed to Lewes gaol to take his trial for the murder, and who was in gaol under that charge, when the several advertisements appeared—The information charged in the first count, "That the defendants, before the preferring of the indictment against Bignold for the supposed crime, and before the trial, &c.; for the purpose of preventing the due course of law and justice, and to influence and inflame, and prejudice the minds of the people against the said Bignold, &c. &c. published the infamous and malicious libel following, &c." The libel was then set out, and was a paragraph in the newspaper. The paragraph consisted of a statement of the depositions taken before the justice of the peace before whom Bignold was charged with the offence, and contained several expressions and representations prejudicial to the character of Bignold. The defendant's counsel contended, that the account published was a true report, founded on the depositions taken; and in order to prove that part of the case, called the clerk of the justices before whom the depositions had been taken. Heath, justice, interposed—he said "Such evidence was

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As individuals are frequently injured by publications of the above kind, they have their actions and criminal remedies concurrently with the courts of justice, who may likewise attach the parties for contempts, when such publications contain any libellous reflections upon their administration of justice,—as by imputing undue motives to them, and endeavouring to impair their dignity, and lawful authority.

But, in a case where the libel is against a single judge, or a jury, the crown or court may direct indictments or informations.[5]

inadmissible; that putting the criminality of such proceeding out of the question, the evidence offered was *exparte;* it was the deposition made by the prosecutor only. But he was of opinion, that the *mere publication of exparte* evidence before a trial was of itself highly criminal." He refused it, and both the defendants were found *guilty*. 5 Esp. N. P. R. Horsham Lent Assizes, 1804.

[5] *The King* v. *Hart* and *White*.—This was an information filed by the Attorney-General against the defendants for certain libels published by them in a newspaper, 17th of January, 1808, and two others on the 24th of the same month, "With the intent to bring the administration of justice, and the trial by jury, as by law established, into hatred and contempt; and to insinuate that one William Chapman and one Thomas Bennett had been improperly acquitted, and found *not guilty* at their respective trials for murder, with which they had been charged; and to traduce, defame, and vilify Sir Simon le Blanc, the judge, and the jurors of the respective juries by whom the said Thomas Bennett and William Chapman had been found *not guilty*."

In this case Sir N. Grose observed upon the trial, "It certainly was lawful with decency and candour to discuss the propriety of the verdict of the jury, or the decisions of a judge; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal; but on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspaper set out in the information contai. ed no reasoning or discussion, but only declamation and invective, and were written, not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country."

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Such proceedings are always most in conformity with the established principles of law, and the rules of natural equity.—Every mode of administering justice, which encroaches upon the trial by jury, ought to be watched with anxious jealousy. It is necessary, as we have shewn, that courts of justice should have the power to punish for contempts; but it is a power which has its justification in necessity alone, and should rarely be exercised, and never but in those cases where the necessity is plain and evident.

The defendants were found guilty on this and a similar information, and sentenced to three years imprisonment. 48 *Geo. III.* 1808, *K. B. Guildhall.* 1. *Camp. N. P.* 359.

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CHAP. X.

SCANDALUM MAGNATUM.

We had occasion to speak concisely of this branch of the offence of slander in the first book of the present treatise. The law on which the action *de scandalis magnatum* is grounded, is the 2 Rich. II. st. 1. c. 5. It is a statute, not detracting, in respect to the creation of any new offence, from the simplicity of the common law (for the common law always punished slander and libel as *mala in se*), but accumulating new penalties upon an ancient mode of injury, in respect to the honour of the persons affected, and the peace of the state.

This statute enacts, "that of counterfeiters of false news, and horrible lies, of prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the King's house, justices of the one bench or the other, and other great officers of the realm, it is enacted, that none contrive or tell any false things, of prelates, lords, and of others aforesaid, whereof discord and slander might rise within

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the realm, and he who does the same, shall incur and have the pain ordained thereof by the statute of Westminster the first, 3 Edw. IV. c. 44, which will, that he be taken and imprisoned, till he have found him of whom the word was moved." And by statute 12 Rich. II. c. 11, it is further provided, that, "should he not be able to find such person, he shall be punished by the advice of the council, notwithstanding the said statutes."

At the time of making this law, the feudal system prevailed in all its mischievous integrity: the whole kingdom was a kind of military encampment; every noble considered himself sufficient to avenge his own injury, and all provocations by vilifying words were redressed by the sword. Hence proceeded factions in the commonwealth which endangered the government. It was good policy; therefore, in the legislature, to provide an exemplary punishment for the defamation of the nobles, in order that they might not be driven to carve out remedies for themselves. This statute, however expedient at the time, is now almost obsolete. Within the last century it has seldom been resorted to; the nobles of the realm very prudently preferring to waive all privilege in an action for slander, and to stand upon the same footing with respect to civil remedies as their fellow subjects.

It will be necessary, however, to point out some few cases which have occurred on this statute.

It has been holden that the King is not included in the words *great men of the realm*, as the statute begins

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with the enumeration of persons of inferior rank. *Cromp. Jur.* 19, 35.

Also it is holden, that a woman, noble by birth, is not entitled to this action. *Cromp. Jur.* 34.

It has been adjuged, that though there was no viscount at the time of making this statute, yet, when created noble, though by a new dignity, he was entitled to his action on this statute. *Cro. Car*, 236.

It has also been adjudged, that, since the union, a peer of Scotland (and by consequence a peer of Ireland since the union with that country), may have an action on this statute, and that it is not necessary for him to allege that he has a seat and voice in parliament. *Com. Rep.* 432, pl. 209, *Lord Viscount Falkland* v. *Phipps.*

It is said also, 4 *Coke* 13, that any great man, or officer of the realm, shall have this action, if words are spoken to the slander of him. See also *Comyn. Dig.* tit. *action on the case.* b. 1.

It is to be presumed, however, that the expressions *any great man*, or *officer of the realm*, are terms of too vague a description to be comprehended within the penalties of this act.

A baron of the Exchequer, though the statute does not expressly name the court of which he is a judge, may have this action. *Pal.* 565.—But it does not lie for a peer, if he were not so at the time of speaking. *Pal.* 566.[h]

[h] Though words are not so certain as to maintain an action against a common person, yet, if they sound in slander, *scandalum magnatum* lies; as, if a man say, "My Lord P—— sent after me to take my purse," though

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We have referred to a few leading cases upon this branch of slander, with which we shall close the chapter.

As this action is *tam pro domino rege quam pro se ipso*, and the scope of it is the prevention of discord, and the maintenance of the public peace, the defendant, it is said, cannot justify, or insist upon the truth of the words. 2 *Mod.* 166. But the defendant may avail

he do not say *feloniously*. 1 *Lev.* 277; 1 *Sid.* 434; 1 *Vent.* 60; *Com. Dig.* tit. *Act. on the Case*, b. 2.

Scan. mag. was brought for these words:—"You have no more conscience than a dog; so that you have goods you do not care how you come by them;" and holden actionable. *Cromp. Jur.* 18. *Duke of Buckingham's Case.*

So likewise for these words:—"My Lord P—— is an unworthy man, and acts against law and reason." 2 *Mod.* 15.

So, for saying of a judge, "You are a corrupt judge." *Cromp. Jur.* 35; *Lord C. J. Dyer's Case.*

So, for these words:—"I. S. is a covetous and malicious bishop." *Bac. Abridg.* Vol. VI. p. 99.

In *scan. mag.* for these words:—"My Lord L—— is a base earl, and paltry lord, and keeps none but rogues and rascals like himself." Williams, and Croke, justices, held the action lay, for the words touch him in his honour and dignity, and may raise contempt from the people, and that, in case of nobility, general words will maintain an action. But Yelverton and Fleming seemed to incline to the contrary, and said the words touched not his life, loyalty, or dignity, but were only words of spleen; *et adjornatur*, and after the defendant died, and the writ abated. *Cro. Jac.* 196.

Earl of Sandwich, qui tam, v. *Miller*.—This was an action of *scandalum magnatum* brought by the plaintiff against the defendant for a libel in the London Evening Post. The libel charged the earl, who was officiating as the first lord of the admiralty, "with having put up certain naval offices to sale, and having actually sold them." This cause was tried, and a verdict found for the plaintiff, 3,000*l.* damages.—*K. B.* 1773.

For words of mere ill manners, equivocal meaning, and which, in common import, imply no scandal, an action will not lie on this statute. *Com. Dig.* tit. *Action on the Case*, b. 2.

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himself of an implied justification from the occasion and manner of speaking, and thereby extenuate the meaning of them, as was done in Lord Cromwell's case. 4 *Coke*, 14.

This action, perhaps, has been brought less frequently, on account of the discordant construction which has been put upon it on various occasions.

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CHAP. XI.

OF LIBELS AGAINST MAGISTRATES.

As the magistrate is the servant of the law, and the officer of its administration and execution, it peculiarly becomes the law to support itself, in the safety and due honour of the persons of its ministers. Every system of law, therefore, has always regarded slander and libel against magistrates as more immediately directed against its own authority. The law of England adopts both the reason and the practice.

In 5 Coke's Report, p. 125; Hobart's Rep. p. 215; 5 Mod. p. 167; and 9 Coke's Rep. p. 59, are to be found certain rules with regard to this species of defamation. Lord Coke says, that every libel is made either against a private man, or against a magistrate, or public person; and if it be made against a magistrate, or other public person, that is still a greater offence, and deserves a greater punishment; because this concerns, not only a breach of the peace, but is a scandal to the government. The other reports take notice of the other points.

It would indeed be most irrational and absurd to imagine, that the law of England afforded a better protection to the character of a private individual than

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to a magistrate or public person, employed in the administration of justice, or the offices of government.

There have been many cases in the Star-Chamber for this species of libel;[1] for example, the well known

[1] One Jeffe was indicted for a libel directed to the King against Coke the Chief Justice of the King's Bench, for a judgment given by him in the case of Magdalen College, affirming the said judgment to be treason, and calling the Chief Justice "Traitor, and perjured judge." This libel he fixed upon the great gate entering Westminster Hall, and divers other places. Being arraigned, he put in a scandalous plea, affirming that he would not plead otherwise. It was adjudged that he should be committed to the marshal, stand upon the pillory, be imprisoned till he submitted to every court, be bound to his good behaviour with sureties during his life, and pay 1,000*l.* fine to the King. 5 Car. 1630, K. B. 15 Vin. Ab. 89, pl. *The King* v. *Jeffe.*

An information was prayed for against the defendant, for printing in a newspaper called the York Journal, that Richard Thompson, an alderman of York, and a justice of peace, was "Scandalously guilty of telling a lie in divers companies." It was contended that this charge did not affect Mr. Thompson in his office; nor was there any thing malignant in it. An action will not lie for these words, and consequently no information ought to be granted. But the whole court were clearly of opinion that the words were libellous. And (by Page, justice) an information ought the rather to go in this case because no action lies. And it is also an aggravation, that these words are spoken of a magistrate; for words spoken of a magistrate may be libellous, when they are not so in the case of a private person; and he cited to his point Sir Lionel Waldron's case, who was a justice of peace, and brought an action for being called a papist; and it was holden to be maintainable, because the words were spoken of a magistrate, although it would not have been so in the case of a private person. The court therefore granted an information. *Trin. Term,* 11 Geo. II. 1738. *And.* 228, *The King* v. *Staples.*

Thus in *The Queen* v. *Langley,* Holt, C. J. says, that words *(a fortiori libels)* spoken against a magistrate in his office, inasmuch as they tend to asperse government, are highly criminal; and if spoken of him in court, they are a contempt, for which the offender may be fined. 2 Salk. 698. See likewise 5 Mod. 43. *The Queen* v. *Ovosi.*

The King v. *Hart and White.*—An information was filed by the Attorney-General against the defendants, for printing and publishing in a newspaper, called the Independent Whig, certain libels, with intent to bring

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case of one Wrennum for traducing Lord Chancellor Bacon in a petition to the King. The offence was great, but the punishment was a disgrace to the court, and is justly numbered amongst those atrocious sentences which raised such an odium against it, that the nation was never easy till its overthrow. Wrennum was a man of rank and of parts; he had been ruined by an expensive litigation in the court of Chancery, and had some reason to suspect that his adversary owed much of his success to his practices upon the lamentable weakness of Lord Bacon; a man, a most extraordinary example of the greatness and infirmity of the human mind. He complained of his treatment in a petition to the King. The court of Star-Chamber found him guilty of a libel, sentenced him to perpetual imprisonment, to be pilloried, and to lose his ears. 16 *Jac.* 1618; *Popham*, 135, *Wrennum's Case*.

Nothing, however, is to be construed a libel which is necessary to the course of legal proceedings, and relevant to a matter before a court. How far this species of defamation may affect persons not in the functions of magistracy we shall point out in the following chapter.

The plaintiff brought an action against the defendant for a libel, and declared, amongst other things,

the administration of justice into contempt, and to defame and vilify Lord Ellenborough, Chief Justice of the court of King's Bench. The libels were contained in certain letters which represented his Lordship as disgracing his high station, and preventing justice being done to a person who sought it at his hands in court, alluding to the case of *Boyce* v. *Bayliffe*, which had lately been tried before his Lordship. The letters were in the highest degree defamatory and scurrilous. The defendants were found guilty. K. B. E. T. 1808, 48 Geo. III.

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"That he being vicar-general to the Bishop of Lincoln, the defendant had caused to be printed a petition to parliament, charging him with divers crimes, as extortion, oppression, and corruption in his office." The defendant justified the publication, and insisted on the truth of the subject matter of the petition. The action was holden not to lie, the petition being the necessary and usual mode of complaint to parliament for the redress of any grievance. *Lake* v. *King*, 1 Saund. 121.[k]

Lord Mansfield recognised and approved the doctrine laid down in this case, in *Astley* v. *Younge*, 2 Burr. 811. So no matter which is stated in any memorial or petition against the conduct of magistrates or public officers shall be deemed libellous, provided it be done *bona fide*, with a view of obtaining redress; and likewise, that it be addressed in the proper channel by which such redress may be had; that is, to the persons who may be presumed to have power to give such redress.

As where the defendant, being deputy governor of Greenwich Hospital, compiled and wrote a large volume, of which he printed several copies, containing an account of the abuses of the hospital, and treating the characters of many of the officers of the hospital (who were *public* officers) and Lord Sandwich, in particular, who was then first lord of the Admiralty, with much asperity. He distributed the copies to *the governors of the hospital only*, but it did not appear that he had given a copy to any other person. On a rule

[k] See likewise 1 Hawk. P. C. 194, and 2 Inst. 228, and *The King* v. *Creevey*, 1 Maule and Selwyn, 280.

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for an information for this libel, Lord Mansfield observed,—that this distribution of the copies to the persons only who were from their situations called on to redress their grievances, and had, from their situations, competent power to do it, was not a publication sufficient to make that a libel; and he seemed to think, that whether the paper were in manuscript or printed, under these circumstances, made no difference.—*Rex* v. *Baillie*, M. T. 30 Geo. III. B. R.[1]

[1] *Oliver* v. *L. W. C. Bentinck*, 3 Taunton, 456, on this subject; and *Jekyll* v. *Sir John Moore*, 2 New Reports, 341. This subject is more fully discussed in the following chapter.

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CHAP. XII.

OF LIBELS AGAINST PRIVATE PERSONS.

The general principles upon which the law of libel is founded have already been sufficiently developed in the preceding pages. The grounds of this law have been proved to be just and equitable, founded in reason, and necessary to society.

It has been shewn, moreover, in what manner the law of the land protects from this species of injury political persons of all kinds, whether corporate establishments, or individual magistrates; and we have now further to shew, that it extends a similar protection to all its subjects whatever.

No man can reasonably set his own character at a higher estimation than the law of England puts upon it. Acting in the same spirit, in which in all criminal cases it presupposes a party innocent till proved to be guilty, it takes the honesty, morality, and sound religion of every member of the community, as a reasonable presumption; and therefore, deeming his good character as a part of his personal rights, will not suffer him to be molested or assailed therein, except in the same manner by which his property may be divested, —that is, by due judgment and conviction of law.

No man therefore can have a right of being at once

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the accuser and judge of another; or of measuring out the degree of punishment, in reproachful accusation, which his passions may deem any imputed crime to merit.

Written defamation has already been explained to be the injurious detraction of any one by writing or equivalent symbols; in the language of Lord Coke, *scriptis aut sine scriptis.* 5 *Coke*, 125. The word *libel* is a technical word; a word which derives its meaning rather from its use than its etymology. It has been observed by Lord Camden, in his judgment in *The King* v. *Wilkes*, 2 *Wilson*, 151, "There is no other name but that of *libel* applicable to the offence of libelling, and we know the offence specifically by that name, as we know the offences of horse-stealing, forgery, &c. by the names which the law has annexed to them. As to the offence of libel it is a high misdemeanour."

Libels, as affecting the character of private persons, may be distributed according to their objects.

1st, Libels, which by accusing a man of a crime, bring him within the danger of the laws.

2d, Libels, which have a tendency to injure him in his office, profession, calling, or trade.

3d, Libels, which by holding him up to scorn and ridicule, and still more to any stronger feeling of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse, and mutual benevolence, which man has with respect to man.

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The first subject of a brief consideration (for under these heads it will be sufficient to mark out those leading principles from which others branch), is to shew what are those libels which, by reproaching a man with the commission of any crime, endanger him in point of law.

Writings, in order to be libellous under this head, must distinctly impute crimes and misdemeanours which are recognised as such, and are punishable by law, as to charge a man with felony. *Buller*, N. P. p. 9.

Thus, for example, no action will lie for publishing of any man that he is *forsworn*, unless it be added, that he was so *forsworn* in a judicial proceeding;—though the allegation of perjury is the same in both cases, but, in the one case, it is recognised as a crime by the law, and in the other is mere moral depravity. But the allegation in writing of the words, *he is perjured*, is libellous, for these words, being the legal term for the crime, shall be intended to mean that he is forsworn in a judicial proceeding. 4 *Rep.* 15. 2 *Bulst.* 150. 3 *Inst.* 156. *Holt* v. *Scholfield*, 6 T. R. 691.

It may be laid down, therefore, as the law in all cases, that the allegation of any act, which the law recognises and punishes as a crime, is libellous. But on the other hand, the allegation of acts, which, though crimes, are not so recognised by the law, or the allegation of them in such a manner that the terms employed do not meet the legal designation of the crime, are not libels, at least under *this head*. Thus, an action does not lie for publishing these words of J. S.—" *He has delivered false evidence and untruths in his answer to a*

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bill in Chancery;" for, as some things in a bill in Chancery are not material to the matter in dispute between the parties, it is no perjury, although such things be not truly answered. 1 *Roll. Abr.* 70. 3 *Inst.* 167.

The law, however, with a due regard to its own administration, has taken care not to impair its means of evidence, and, most particularly, not to discourage, or render perilous, that accusation and discovery, which are the instruments of bringing crimes before its cognisance, and obtaining redress for the parties injured. The intention of the law, in prohibiting persons to avenge themselves by libels, is to prevent the mischief of a man's erecting himself into his own judge, and to oblige him to refer the decision of his grievance to an impartial person whom the law has appointed to determine it.

Thus, it was holden that an action for a libel could not be maintained for exhibiting a bill to the Queen (petitions to the sovereign being at that time in the ordinary course of legal proceeding) charging the plaintiff to have recovered 400*l.* of the defendant, by perjury, forgery, and cozening; "Because," said the court, "the Queen is the fountain of justice, and all her subjects may lawfully resort to her to complain; but if they will divulge the contents to the disgrace of the person, it is actionable." 3 *Lev.* 138, *pl.* 187. *Hare* v. *Mellor.*

Therefore it has been resolved that no false or scandalous matter contained in a petition to parliament,*

* But any thing false and scandalous, either presented in the shape of a petition to parliament, or by way of application to a court of justice, where

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though it charge a person with positive crimes (1 *Lev.* 240), or in articles of the peace exhibited to magistrates, shall be deemed libellous. 4 *Cok.* 14. 1 *Hawk.* P. C. c. 73, § 8.

Also it has been holden, that no presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also, because it would be an impediment to public justice to discourage them from making their inquiries with that freedom and boldness which the good of the commonwealth requires. *Moor*, 627; *Hawk.* P. C. c. 73, § 8.

If a court-martial, after stating in their sentence the acquittal of an officer against whom a charge has been preferred, subjoin thereto a declaration of their opinion, that the charge is malicious, and groundless, and that the conduct of the prosecutor, in falsely calumniating the accused, is highly injurious to the service, the president of the court-martial is not liable to an action for having delivered such sentence and declaration to the judge advocate.[a]

the malicious and defamatory intention is evident, would subject the party, who so abuses the tribunal to which he applies, to punishment for a contempt, though it might be no libel.—In such a case it would be the court which is offended and disparaged, and not the persons whose names are mentioned in the petition or application.

[a] This was an action for a libel. The defendant, after stating that the plaintiff was an officer of the 43d regiment, and had preferred certain charges against Colonel Stewart, of the same regiment, which were tried by a general court-martial, alleged, that the defendant published the following libel:—"The court cannot pass without observation the malicious and groundless accusations that have been produced by Captain Jekyll,

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Also, it is holden by some, that no want of jurisdiction in the court before which a charge of crime or misdemeanour is exhibited, will make it a libel, because the mistake of the court is not imputable to the party, but his counsel. But herein it is said by Haw-

against an officer whose character has, during a long period of service, been so irreproachable as Colonel Stewart's; and the court do unanimously declare, that the conduct of Captain Jekyll, in endeavouring falsely to calumniate the character of his commanding officer, is most highly injurious to the good of the service."—Plea, not guilty.

At the trial before Sir James Mansfield, C. J. at the Middlesex Sittings after Trinity Term, it having been proved that the defendant was president of the court-martial, and that the supposed libel formed part of the opinion of the court, delivered by the defendant to the Judge Advocate, for the purpose of being submitted to the King; and immediately followed the declaration of the opinion of the court-martial,—"That he, the aforesaid Colonel Richard Stewart, is not guilty of either of the charges, and the court do most fully and most honourably acquit him,"—His lordship nonsuited the plaintiff.

In the Michaelmas Term following, counsel moved for a rule to shew cause, why this nonsuit should not be set aside, and a new trial granted, contending, that, although the defendant was not liable to an action for any thing contained in the sentence of the court-martial upon the matters submitted to it by the King for its decision, yet, that the libel in question was no part of the sentence, which ended upon the acquital of Colonel Stewart. That the conduct of the plaintiff formed no part of the matters submitted to the court; and that, consequently, whatever the defendant published respecting it was not done in the discharge of his duty, and therefore the defendant was responsible for it in a civil action.

Sir J. Mansfield, C. J.—"In order to enable the court-martial to decide upon the charges submitted by the King, they must have all the evidence as well on the part of the prosecution as of the defence, and after hearing both sides are to declare their opinion whether there be any ground for the charges. If it appear that the charges are absolutely without foundation, is the president of the court-martial to remain perfectly silent on the conduct of the prosecutor? or can it be an offence for him to state that the charge is groundless or malicious? It seems to me that the words

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kins, that if it shall manifestly appear from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, and commenced not with a design to go through with it, but only to expose the defendant's character under a show of a legal proceeding, there can be no reason why such a mockery of public justice should not rather aggravate the offence than excuse it, and make such a scandal a good ground of indictment at the suit of the King, as it makes the malice of the proceeding a good foundation for an action on the case at the suit of the party, whether the court had a jurisdiction of the cause or not. 2 *Keb.* 832; 4. *Cok.* 14. *Hawk.* P. C. c. 73, § 8.

But, where the charge was, that the defendant, in a certain affidavit before the court, had said that the plaintiff in a former affidavit against the defendant had sworn falsely (which words amounted to a positive charge of perjury), the court held that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing, and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood; this therefore being necessary in the course of legal proceeding no action will lie. *Astley* v. *Younge*, 2 *Burr.* 817.

This limitation upon the action of libel has been still more clearly elucidated in the case of the *King* v. *Wright*, 8 *T. R.* 293.

A rule having been obtained, calling on the defend-

complained of in this case form part of the judgment of acquital, and consequently no action can be maintained upon it."

Rooke and Chambers, justices, were of the same opinion. Jekyll v. Sir John Moore, 2 *New Reports*, 341.

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ant (a bookseller) to shew cause why a criminal information should not be granted against him for publishing a libel on J. Horne Tooke, the defendant made an affidavit, in which he stated that the charge on Mr. Horne Tooke was a paragraph contained in the Report of the Committee of Secrecy of the House of Commons, a literal copy of which he had published, and that he did not publish the Report with a view to calumniate Mr. Horne Tooke.

The paragraph complained of, and which was contained under the title "Attempts to Assemble a Convention of the People of England," was as follows:—"Some of the persons so arrested were prosecuted for high treason. A grand jury for the county of Middlesex found a bill against Thomas Hardy, the secretary of the London Corresponding Society, and eleven others: three of the persons so indicted, viz. Thomas Hardy, John Horne Tooke, and John Thelwall, were tried, and on their trials were acquitted of the charge in the indictment. But the evidence given on those trials established, in the clearest manner, the grounds on which the committees of the two houses of parliament had formed their report in 1794; and shewed beyond a possibility of doubt, that the views of these persons and their confederates were in their nature completely hostile to the existing government and constitution of this kingdom, and went directly to the subversion of every established and legitimate authority."

After argument by counsel on both sides, the judges delivered their opinions *seriatim*, and discharged the rule *nisi*.

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Lawrence, justice, observed, "This case has been chiefly argued on two grounds. First, it is said that the report of the house of commons is itself unjustifiable, inasmuch as it imputed a crime to the prosecutor, and deprives him of his privileges. It is said that this report charges him with being guilty of high treason, notwithstanding a verdict of the jury had ascertained his innocence; but that is not the fair import of the paragraph. It is possible that a man may have views hostile to the government and constitution of the kingdom, without being guilty of high treason, especially of the particular treason imputed to the persons there mentioned. It does not therefore follow that this report charges those persons with the same crime of which they had been before acquitted. But the chief ground taken by the prosecutor's counsel is, that though the report of the house of commons cannot itself be considered a libel, the defendant not acting under the authority of the house, may be indicted for publishing it with a view to general circulation. It has been said that the publication of the proceedings of courts of justice, when reflecting on the character of an individual, is a libel; to support which position the case of *Waterfield* v. *the Bishop of Chichester* has been cited. But on examining that case, it appears that the charge there was, that the plaintiff had not published a true account. There the plaintiff suggested for a prohibition that the bishop had excommunicated him for refusing to take the oath *ex officio,* on his being chosen churchwarden of Arundel: it afterwards appeared that he was excommunicated for having refused to take the oath of a churchwarden according to law; and the ground of the prohi-

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bition being false, a consultation was awarded: then the plaintiff published a supposed account of the prohibition, entitled, "A true copy of a writ of prohibition granted, &c. against the bishop of Chichester, who had proceeded against and excommunicated one T. Waterfield, a churchwarden, for refusing to take the oath usually tendered to persons in such office, by which writ the illegality of all such oaths is declared, &c." Now that publication was not a true statement of the proceedings of the court: he at first obtained a prohibition on a false representation of the fact, and after the consultation was awarded, he published a false account of the proceeding in prohibition; and the court declared that such false account was a seditious libel. Therefore I do not think that that case established the proposition to support which it was cited. I am not aware of any authority that does support it. The proceedings of courts of justice are daily published, some of which highly reflect on individuals: but I do not know that an information was ever granted against the publishers of them. Many of these proceedings contain no point of law, and are not published under the authority or sanction of the courts, but they are printed for the information of the public. Not many years ago an action was brought in the court of Common Pleas by Mr. Currie against Walter, proprietor of "The Times," for publishing a libel in the paper of "The Times," which supposed libel consisted in merely stating a speech made by a counsel in this court, on a motion for leave to file a criminal information against Mr. Currie: Lord Chief Justice Eyre, who tried the cause,

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ruled that this was not a libel, nor the subject of an action, it being a true account of what had passed in this court: and in this opinion, the court of Common Pleas afterwards, on a motion for a new trial, all concurred, though some of the judges doubted whether or not the defendant could avail himself of that defence on the general issue. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons also apply to the proceedings in parliament: it is of advantage to the public, and even to the legislative bodies, that the true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller. Though, therefore, the defendant was not authorised by the house of commons to publish the report in question, yet as he only published a true copy of it, I am of opinion that the rule ought to be discharged."

Neither can it be deemed a libel, if a party, deeply interested in the investigation of any fact, should, as one of the means of investigation, make such written inquiry of another, as amounts to the imputation of a crime. Even where such enquiry should not appear to be made with a view towards a legal pro-

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ceeding, yet if done *bona fide*, and with an honest intention, the law will protect such a publication; as in the case in the note.*

Though the case of *Currie* v. *Walter*, 1 *Bos.* and *Pull.* 525, and *The King* v. *Wright*, fully establish the right of publishing a fair and honest account of the proceedings of courts of justice, yet, the case of *The King* v. *Lee*

* This was an action for a libel. Plea—Not guilty. The declaration stated, that the defendant, intending to charge the plaintiff with the crime of bigamy, and to bring him into danger of legal punishment, published the false and malicious libel following: that is to say,

"Ten guineas reward.—Whereas, by a letter lately received from the West Indies, an event is stated to be announced by a newspaper, that can only be investigated by these means: this is to request, that if any printer or other person, can ascertain that James Delany, Esq. (the plaintiff) some years since residing at Cork, late lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of August, 1799, they will give notice to —— Jones (the defendant) No. 14, Duke-street, St. James's, and they shall receive the reward."

There was an innendo, that the defendant meant thereby to insinuate and to have it understood, that the plaintiff had been, and was married before the time mentioned in the advertisement, and had another wife then living; he being then married to one Elizabeth Weston his present wife.

The defence relied upon and given in evidence was, that this advertisement had been inserted by the authority of the plaintiff's wife, for the purpose of discovering whether the plaintiff had another wife living.

Lord Ellenborough said, "This paper is relied upon as necessarily carrying with it the imputation that the plaintiff was guilty of bigamy. You must be of opinion that it does carry such impuatation, before you can find a verdict for the plaintiff, as that meaning is necessary to make the paper a libel at all. The plaintiff's counsel contend, that you are to take into your consideration only, whether the advertisement conveys a libellous charge against the plaintiff or not? I am of a different opinion: I conceive the law to be, that though that which is spoken or writen may be injurious to the character of the party, yet if done *bona fide*, as with a view of investigating a fact, in which the party making it is interested, it is not libellous. If therefore this investigation were set on foot, and this advertisement published by the plaintiff's wife, either from anxiety to know whether she was

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and *another*, and *The King* v. *Fisher* and *another*,[p] sufficiently shew, that any *exparte* publication, which, by the omission, addition, falsification, or aggravation of any circumstances of the case, tends to present it to the judge, the jury, or the public, in a point of view suitable to the interest of one party, and contrary to its truth, cannot be justified; and that all such statements are not within the reason, and, of course, not within the protection of the admitted right of publishing judicial proceedings. Upon this point, lord Ellenborough in in the case last alluded to, 2 *Camp. N. P.* 571, speaks as follows—"Trials at law fairly reported, although they may occasionally prove injurious to individuals, have been holden to be privileged: let them continue so privileged. The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent; and to poison the sources of justice. But what defence can be made for a publication, which, besides contain-

legally the wife of the plaintiff? or, whether he had another wife living when he married her? though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable: but in such a case, it is necessary for the defendant who publishes the libel, to shew that he published it under such authority, and with such a view. The jury are therefore first to say, whether the advertisement imputes a charge of bigamy to the plaintiff; and if they think it does, then to enquire whether the libel was published with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel; and the defendant is entitled to a verdict."

The jury found a verdict for the defendant. *Delany* v. *Jones*, 48 Geo. III. 1808. 4 *Esp.* N. P. R. 191.

[p] These cases have been already cited. See p. 161.

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ing an *exparte* statement of evidence before a magistrate, against a man who has had no opportunity to defend himself, actually denominates him a criminal, and describes him as a monster? It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial should be guarded against. Every one of us may be questioned in a court of law, and called upon to defend his life and his character; we would then wish to meet a jury of our countrymen with unbiassed minds. But for this there can be no security if such publications are permitted. The necessary tendency of the libel was, in the language of the indictment, to traduce and defame the prosecutor, and to prejudice him in the minds of his countrymen, and to cause it to be believed that he was guilty of the offence laid to his charge, and to deprive him of the benefit of an impartial trial. If so, the law infers that such was the intention of the defendants in publishing it, and they must answer for the injury they have thus done to the prosecutor individually, and to the community of which he is a member."[q]

If an *exparte* statement, under certain cirumstances, be not protected, by reason of its probable injury to the justice of the case, still less is any account so protected which is false. Such falsehood is a manifest contempt of the court, for which, as we have shewn in a preceding chapter, the court can punish by attachment. And, if it be an injury to the course of justice, still more immediately is it injurious to the individual concerned, and the subject of an action.—As in the case of *Stiles* v. *Nokes*, 7 *East*, 493, in which it was deemed libellous to publish a highly coloured account

[q] The defendants were found guilty.

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of judicial proceedings, mixed with the party's own observations and conclusions on what passed in court,—in which account was likewise contained an insinuation that the plaintiff had committed perjury.[r]

[r] This was an action on the case for a libel against the plaintiff. The plaintiff at the time of publishing the libel was clerk of the court of Requests for the borough of, &c. The libel charged that the defendant, with a view to injure him in his said office and employment, and to cause it to be believed that he was guilty of perjury, &c. and also of other delinquency in his said office, &c., published in a certain newspaper, &c., a certain false, scandalous, and malicious libel of and concerning, &c. The defendant pleaded the general issue and a justification; the substance of which was, that the supposed libel was the report of a trial (*The King* v. *Stiles*), at the quarter sessions. The court held, that it was no justification to such insinuation of perjury against the plaintiff as was contained in the libel (who had sworn to an assault of A. B. on him) that it did appear (which was the suggestion in the libel) from the testimony of every person in the room, &c., except the plaintiff, that no violence had been used by A. B. &c., for *non constat*, thereby that what the plaintiff swore was false; neither is it a sufficient justification, in an action for publishing judicial proceedings, when the extraneous matter is so mixed with the judicial account, as to make it uncertain whether it could be separated, to justify the publication by general reference to such parts of the supposed libel as purport to contain an account of the trial, &c. and that the said parts contain a just and faithful account of the trial, &c. In this case it was observed by Lord Ellenborough, and Grose, justice, "It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial enquiry, are very distressing to the feelings of individuals on whom they reflect; and if such circumstances were afterwards *wantonly* published, I should hesitate to say, that such unnecessary publication was not libellous, merely because the matter had been given in evidence in a court of justice."

In the same manner, in *The King* v. *Creevey*, 1 *Maule* and *Selwyn*, 280, to which case we shall have occasion to refer in a following page: Bayley, jusice, thus speaks of the liberty of the press in the publication of proceedings in a court of justice:—

"It has been argued that the proceedings of courts of justice are open to publication,—against that, as an unqualified proposition, I enter my protest.—Suppose an indictment for blasphemy, or an indictment where inde-

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The proceedings of courts of justice in England are public, not, as asserted by our popular writers, with any view to controul the courts by public opinion, but simply because, in ordinary circumstances, there is no reason for secresy; and, in ordinary circumstances, such publicity is a manifest good; and therefore, has always been encouraged by the judges of our courts. But when the nature of a cause or any evidence in it, however necessary it might be to the trial, may be injurious to any public interest, whether of good morals, public decency, or private feeling, it is of course within the rights of a court of justice to close its doors against all but those concerned in the cause, and necessary to its trial.—Such, for example, as in trials for blasphemy, obscenity, &c.—Nor will it follow, that in cases where the doors are open to all comers, which is the most frequent course, that any hearer may publish all that he may hear. He is still within the obligation of not using his faculties in producing any public or private mischief.—The court and jury try what they hear, and give to evidence, and the

cent evidence was necessarily introduced, would every one be at liberty to poison the minds of the public, by circulating that which, for the purposes of justice, the court is bound to hear? I should think not: and it is not true, therefore, in all instances, that the proceedings of a court of justice may be published. Again, it may be said, that counsel have a right, in pursuance of their instructions, and whilst the cause is going on, to endeavour to produce an effect by making such observations on the credit and character of parties and their witnesses, as sometimes, when the cause is over, perhaps they are sorry for. But have they, therefore, or any other person who hears them, a right afterwards to publish these observations?—I have no hesitation in saying, that, when the occasion ceased, the right also would cease; and that it would be no justification to plead, that a publication was a transcript of the counsel's speech."

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speeches of counsel, their proper weight. But the publication of such proceedings may very unnecessarily offend private feelings, and, still more frequently, public decency. The trial is before men of gravity and wisdom, bound by an oath to administer justice. The publication of it goes forth to people of all ages, conditions, and passions. And still more strongly would it be a contempt of court and a public wrong, for any advocate employed in a court, to publish, with a malicious and partial intention, his speech in a court—Such speech is necessarily an *exparte* statement.—To put it forth to the world as the whole and true case, supposing the matter to be accusation, would be a manifest libel.

The members of the two houses of parliament, by reason of their privilege, are not answerable at law for any personal reflections on individuals, contained in speeches in their respective houses. But this privilege does not extend to them, or others, in the publication of such speeches. Such publications, therefore, if containing matter of libel, are not protected; as may be seen from the following case.

The King on the prosecution of Sermon v. *Lord Abingdon.* This was an information filed by leave of the court against the defendant for a libel.

The libel complained of was a paragraph in the public newspapers, stated to be part of a speech delivered by lord Abingdon in the house of lords.

The circumstances under which it had been given to the world, as they appeared in evidence, were, that lord Abingdon, having in the house of lords given notice of his intention to bring in a bill in the ensuing sessions of

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parliament to regulate the practice of attornies, had, in the course of his speech, mentioned his having employed Mr. Sermon of Gray's-inn as his attorney, and, after much invective, charged him with improper conduct in his profession, with pettyfogging practices, and other matters highly injurious to the character f Mr. Sermon. This speech his lordship read in the house of lords form a written paper, which paper he had, at his own expence, sent and caused to be printed in several of the public papers. Lord Kenyon observed, "That, as to the words in question, had they been spoken in the house of Lords, and confined to its walls, that court would have no jurisdiction to call his lordship before them to answer for them as an offence; but that, in the present case, the offence was the publication under his authority and sanction, and at his expence. That a member of parliament had certainly a right to publish his speech, but that speech should not be made the vehicle of slander against any individual; if it was, it was a libel: that in order to constitute a libel, the mind must be in fault, and shew a malicious intention to defame; for if published inadvertently, it would not be a libel; but where a libellous publication appeared unexplained by any evidence, the jury should judge from the overt act; and where the publication contained a charge slanderous in its nature, should from thence infer that the intention was malicious."

The jury found his lordship guilty.*

* In the next term, lord Abingdon was brought up to receive the judgment of the court, which was, that he should be imprisoned for three months, pay a fine of 100*l.* and find security for his good behaviour. B. R. 35 Geo. III. 1794.

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A member of the house of commons may be convicted upon an indictment for a libel, in publishing in a newspaper, the report of a speech delivered by him in that house, if it contain libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect publication having appeared in that and other newspapers.[t]

[t] The defendant was tried at the Lent Assizes, 53 G. III. for the county palatine of Lancaster, before Le Blanc, J. for a libel against Robert Kirkpatrick. The indictment charged that the defendant, intending to excite discontent and disaffection in the liege subjects against the administration of the government in the collection of the revenue, and to traduce and vilify Kirkpatrick, being an inspector-general of taxes at Liverpool, appointed under 48 G. III. c. 141. and to bring him into hatred, &c. in the execution of his duty as such inspector, &c. did print and publish a malicious libel of and concerning him being such inspector, and his conduct in the execution of his office, in the form of a report of a speech, purporting to have been made by the defendant in the house of commons, containing, amongst other things, &c. The libel was then set forth, and imputed to Kirkpatrick that he was to be an informer, or accuser, against his neighbours and fellow townsmen, for having their lands assessed below their real value; and that a great annuity was to be his recompence for undertaking to screw up their assessments to the extent of his own imagination; and that this had been carried into effect.

At the trial it appeared that the passages, which constituted the subject of the charge, were contained in a speech delivered by the defendant, who was a member of the house of commons, in his place in that house upon a debate respecting the East India Company's affairs. An incorrect report of what he had there said having appeared in the Liverpool and other newspapers, the defendant sent what was admitted by the counsel for the prosecution to be a correct report of his speech, to the editor of the Liverpool paper, with a request that he would publish it in his newspaper; which he accordingly did. Upon this evidence the counsel for the defendant submitted to the learned judge that there was no question to go to the jury. 1st, There was not any proof of malice so as to constitute the publication libellous on that account; and, 2dly, As privilege of speech in parliament was allowed to every member of parliament, in like manner also he was privileged in publishing a correct account of his speech in parliament.

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The principle of the case of *Rex* v. *Lord Abingdon*, and *Rex* v. *Creevey*, is this,—On account of public utility, the constitution gives unrestrained freedom of speech to the members of both houses of parliament, speaking within their respective chambers; and what-

The learned judge was of opinion that it was not necessary to prove malice, but it might be inferred from the publication itself; and upon the authority of the case of *Rex* v. *Lord Abingdon*, he held that a member of parliament is answerable for publishing what he has delivered as his speech in parliament, if it contain defamatory matter; and that question he left to the jury, stating to them that they were to look both to the matter and manner of the publication in order to decide whether it was libellous or not. The jury found the defendant guilty.

In Easter Term following a new trial was moved for on the ground of a misdirection of the learned judge. It was contended that *Rex* v. *Lord Abingdon* had been supposed to carry the law further than it really did. In that case, as it appeared by the report, it was proved that the prosecutor was the defendant's attorney, and that the defendant having had a quarrel with him went to the house of lords, accused him of unprofessional and dishonest practices, and in order to have a handle for publishing the libel, gave notice of his intention to introduce a bill into parliament, and afterwards published the libel at his own expence. That case, therefore, afforded strong evidence to shew that the whole was founded in malice; and to justify what Lord Kenyon, C. J. said, that a member of parliament had no right to make his speech a vehicle of slander; and thus the publisher might well be held responsible in that case, and yet not in the present; for his lordship emphatically added, that in order to constitute a libel the mind must be in fault, and shew a malicious intent to defame. Now, here, there is not only no proof of any malicious intent, but the inference also is rebutted by the occasion of the publication, which was not made a vehicle of slander, but was for a *bona fide* purpose of correcting misrepresentation touching a matter which had passed in parliament; and, therefore, although it may incidentally contain reflections against an individual, the publisher is not responsible.

The case of *Rex* v. *Wright*, it was added, is decisive of the present: there is only this difference, that there it was a publication of the report of a committee of the house of commons, here it is that of a speech of a member of that house; but both are equally proceedings of that house; and it was held in that case, that to publish a correct account of such proceedings is not libel-

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ever may be there said, is censurable only according to the rules of parliament, and before parliament. It is needless to say, that the reason of this is twofold; in the first place, as above said, its public utility; and secondly, that it would be derogatory to the dignity of

lous.—Only it must be farther observed in favour of the defendant in this case, that he had an interest in the publication, which the defendant in *Rex* v. *Wright* had not, and which also distinguishes it from *Rex* v. *Lord Abingdon*; for he had an interest as a member of the house of commons, the representative body, in defending himself before his constituents against misrepresentation; and as he serves for the whole realm when he is returned to parliament, and not merely for the body of electors who return him, such defence of himself may be as general. And in the commons journals will be found many resolutions against printers, and newspapers publishing the speeches of members as reports of committees in that house, but none against a member himself for so doing. The general rule, then, to be collected from these cases which are analogous seems to be this, that although the publication of a matter may be injurious to the character of an individual, yet if done *bonâ fide* by a party who has an interest in the matter, or who is warranted by the occasion; in either case it will be justified.—Here both those circumstances concurred to justify the defendant.

Lord Ellenborough, C. J.—" If any doubt belonged to this question, I should be most anxious to grant a rule to shew cause, in order to have the ground of doubt more fully discussed and settled. But as I cannot find any thing on which to found even a colour for argument, except what arises from an extravagant construction put on a particular expression of Lord Kenyon, in the case of *Rex* v. *Wright*, it would be to excite doubts, and not to settle them, if we were to grant the rule. What Lord Kenyon there said was this,—' That it was impossible to admit the proceeding of either of the houses of parliament was a libel, and yet that was to be taken as the foundation of the application made in this case.' I will not here wait to consider whether that could be strictly called a proceeding in parliament. What was printed for the use of members was certainly a privileged publication; but I am not prepared to say that to circulate a copy of that which was published for the use of members, if it contained matter of an injurious tendency to the character of an individual, was legitimate, and could not be made the ground of prosecution. I should hesitate to pronounce it a proceeding in parliament in the terms given to some of the judges in that case: but it is not necessary to say whether that be so or

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either house of parliament to be called before the inferior tribunals. But it does not therefore follow, that because a member, for the sake of public good, may speak as he pleases in parliament,—before an assembly, the established rules of which will restrain any mischievous

not, because this does not range itself within the principles of that case. How can this be considered as a proceeding of the commons house of parliament? A member of that house has spoken what he thought material, and what he was at liberty to speak in his character as a member of that house. So far he was privileged: but he has not stopped there; but unauthorized by the house, has chosen to publish an account of that speech in what he has pleased to call a more corrected form, and in that publication has thrown out reflections injurious to the character of an individual. The only question is, whether the occasion of that publication rebuts the inference of malice arising from the matter of it. Has he a right to reiterate these reflections to the public? and to address them as an *oratio ad populum*, in order to explain his conduct to his constituents? There is no case in practice, nor I believe any proposition laid down by the best text writers upon the subject, that tends to such a conclusion. The case of *Rex* v. *Wright*, indeed, determined that a proceeding in parliament could not be deemed libellous; but that does not warrant a publication of it in every newspaper, as was held in *Rex* v. *Lord Abingdon*. As *Curry* v. *Walter*, it is not necessary for the present purpose to discuss that case: whenever that becomes necessary, I shall say that the doctrine there laid down must be understood with very great limitations, and shall never fully assent to the unqualified terms attributed in that case to Eyre, C. J. In the present case the question was left to the jury, whether the publication was libellous, taking into their consideration all the circumstances; and nothing was subtracted from their consideration. The jury have found that it was; and I can see no ground for drawing the subject again into discussion, in order to excite doubts which do not at present exist. In *Lake* v. *King*, the judgment of Lord Hale and of the other judges was founded upon this point, viz. that it was the order and course of proceedings in parliament, to print and deliver copies, of which the court ought to take judicial notice. In order, therefore, to bring this case within the rule in *Lake* v. *King*, we ought to find that it is the order and course of proceedings in parliament, that members should print their own speeches, and that this court will take judicial notice of such a course of proceeding. The very statement of the proposition shews it to be untenable. It is therefore neither within *Lake*

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indecorum,—that he may therefore publish his speech in the shape of an appeal to the people; that he may convert a parliamentary speech into a popular harangue, and carry his privilege of parliament as a shield against legal responsibility, where the reason of such privilege totally ceases.

The privilege is not absolute, but relative; it is not personal, but local; and where the reason ceases, and the condition of place does not exist, the promulgation or publication of slanderous and libellous matter (the privilege being divested with the reason and consideration of it), necessarily stands forth in its own nature, subject to the controul and punishment of law.

In a court or council of public inquiry, such as are the two houses of parliament, the accusation of individuals must frequently occur. The public good requires, that there should be no restraint beyond the rules of the house itself; and the gravity and dignity of the assembly considered, the probable mischief to an individual cannot for a moment weigh against the public good of such freedom. But the mischief would become intolerable, if a member of parliament, having any malignant passion against an individual, might, by first legitimating his slander by carrying it through the house, thereafter publish it without responsibility to the laws.

The next species of libels is that which defames a man in his office, profession, trade, or calling.

v. *King*, nor *Rex* v. *Wright*, giving to that case its fullest effect; and even if it were, perhaps the court would lay down the doctrine with somewhat more limitation than is to be found in that case."

The other judges concurred in this opinion. *The King against Creevey, Esq. M. P.* 1 *Maule and Selwyn's Reports*, 273.

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OF LIBELS AGAINST A MAN WITH RESPECT TO HIS OFFICE.

The legal acceptance of the term office is the exercise of some public duty, or private trust, acknowledged by law. An officer, therefore, is a legal person; that is to say, having a distinct and proper legal designation, and peculiarly protected by the law in the exercise and administration of his duties.

Now, the first and obvious division of offices is into two kinds; offices of honour, and offices of profit. The law of libels follows this division with suitable distinctions.

Therefore any imputations against a person who is in the enjoyment of an office, either public or private, of honour, profit, or trust, which import a charge of unfitness to administer the duty of the office, are libels. *Buller*, N. P. 4.

A distinction is here usually taken between an office of profit and an office of honour; but the distinction is not a sound one, and though it may apply to an action for words, it does not extend to an action for a libel. This will appear hereafter.

If a person be in an office of profit, it is libellous to impute to him either inability, want of integrity, or any thing which amounts to it. But if the office be an office of honour, it is said no action lies, except the import of the words be a charge of dishonesty. But in either case, charging a man with inclinations and principles, which show him unfit for an office of trust or honour, is libellous without charging him with any act. As to charge a justice of peace, or a member of

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parliament, with "being a Jacobite," and for bringing in the Pretender. *How* v. *Prinn. Salk.* 695. *Bull.* N. P. p. 5.

Our law books, under this head, usually enumerate five kind of officers:—1. A judge; 2. A member of parliament; 3. A justice of peace; 4. Officers of a court; 5. Persons in public, or even private trusts.[v]

Thus, to write of a man that he is a corrupt judge; —of a member of parliament, that he is an enemy to the established church; to write of a justice of peace, that he is a debauched man, and not fit to be a justice of peace; of any person in a public office, that he is a cheat; to write of a commissioner for examining witnesses, that he is a corrupt man; to write of a churchwarden, that he has cheated the parish; or of a ba liff, or of any servant, who is to account for money received, that he is a cozening knave to the person who employs and confides in him;—all these written imputations, from their tendency to produce a breach of the peace, and their manifest private injury, are the subjects of indictment, information, and action at the suit of the individual.[v]

It may be necessary to add, for the sake of reference to the authorities, that the greater part of these cases were actions for words; but they apply, *a fortiori*, to *written words;* that is to say, to libel.

Under this division we shall conclude with a case, in which it was determined by Lord Hardwicke, that a charge against trustees of a breach of private trust reposed in them by the parishioners was libellous.

The defendants, churchwardens of the parish of

[v] Com. Dig. Action on the Case, title Office, 247; Bac. Abr. Vol. VI. 212.

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Lambeth, had been convicted of an information, tried at the Surrey Assizes, of a libel in giving public notice in the church, thereby desiring the parishioners to meet and assist them in correcting several abuses, which, by reason of the pretended authority of the trustees appointed by the parish for the management of the workhouse, had been suffered to be committed. Amongst many other objections to the information, it was contended in arrest of judgment, that this was no libel.

Lord Hardwicke, C. J.—" It cannot be taken upon this information, that this is a charge on the trustees of any breach of public trust, the erection of this workhouse, and the government thereof, not appearing to be by act of parliament, or any public authority,—but a breach of *private trust* reposed in them by the parishioners; and any such charge is equally punishable as a libel."

OF LIBELS AGAINST A MAN IN RESPECT TO HIS PROFESSION AND CALLING.

Words, in themselves not actionable, become so, when any person is thereby disgraced or injured in his profession, or any art which he practises.

Though it may be difficult to prove the special damage resulting from such slander as affects a man in his profession, nothing is more clear, than that it has a direct tendency to injure the person of whom it is published, and is therefore actionable.

Numerous cases are collected in the books of actions on the case for *words* published of a man in his profession. If actions lie for mere *words* of this description,

" *The King* v. *Griffin* and *others*. *Rep. Tempore, Hardwicke*, p. 39.

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a fortiori may they be maintained, when the words are rendered more extensively and permanently mischievous by writing.

It will not be necessary to cite cases which apply to this species of defamation, wherein there is an agreement between the action for words and the action for a libel. There is, however, this important distinction,—that, whilst an action on the case only is given for *words* affecting a man in his profession, an indictment or an information will lie for the same slander, when written, from its tendency to provoke a breach of the peace. *Hawk.* P. C. c. 73, § 3.

It is evident, moreover, from the authorities, that words written of a man, tending to disparage him in his profession, will support an action, although the same words, when spoken, would not.[x]

[x] Action for printing and publishing a false and malicious libel against the plaintiff, containing, amongst other things, these words and matters in an answer to a petition preferred by the plaintiff to the house of commons against the defendant,—" The prosecutor is Mr. King, whose violence both formerly and lately is very notorious, to say nothing before his Majesty's happy restoration, of which much might be said too horrid to be related, which this respondent passeth by, in regard of the act of oblivion, though the three years therein mentioned are long since elapsed,"—and also said in the consistory court in Lincolnshire with a loud voice, in the presence of many people,—" that he would strike at the root;" whereas this respondent conceives (always referring himself to the judgment of this honourable house), that there is no root under God of ecclesiastical government, but the King himself (and in the margin, with an asterism, there are those words,—*Saltem quoad potestatem coercivam)*; and that the plaintiff's petition is stuffed with illegal assertions, ineptitudes, imperfections, clogged with gross ignorances, absurdities, and solecisms); by reason of which words and libel he is damnified in his good name and *credit and profession of a barrister at law*, 5,000*l*. Upon not guilty pleaded, a special verdict was found and damages given to 150*l*. Which special verdict found those words in the margin, omitted in the declaration; and this clause also, always referring himself to the judgment of this honourable house.

Sir Robert Atkyns pro Quer', cited Yelv. Rep. p. 152, and Hob. Rep.

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But with respect to this species of defamation, there are certain limits, which the reason and policy of the law have established, to preserve the confidential intercourse of business, and to give a liberal freedom to such discussions in which society is interested.—This principle is apparent from the following cases.

A letter written confidentially to persons who employ *A* as their solicitor, conveying charges injurious to his *professional* character in the management of certain concerns which they had intrusted to him, and in which *B* the writer of the letter was likewise interested, cannot be considered a libel, and made the subject of an action for damages.[7]

180—Stephens pro defendant, insisted that the words, as recited, were too general to ground an action upon.

Hale, Chief Baron.—There is no material variance betwixt the declaration and the special verdict; and although such general words spoken once, without writing or publishing them, would not be actionable, yet here they being writ and published, which contains more malice than if they had been but once spoken, they are actionable, and the court being all of that opinion, judgment was given, pro the plaintiff. *King* v. *Lake, Hardres*, 471.

7 Action for a libel on the plaintiff in his profession as a solicitor.—Plea, the General Issue.

The libel set out in the declaration, was contained in a letter written by the defendant to Messrs. Wright and Co. bankers, at Nottingham, and charged the plaintiff with improper conduct in the management of their concerns. It appeared, however, that the letter was intended as a confidential communication to these gentlemen, and that the defendant was himself interested in the affairs which he supposed to be mismanaged by the plaintiff. After the case had been opened by the plaintiff's counsel,

Lord Ellenborough said, if the letter had been written by the defendant confidentially, and under an impression that its statements were well founded, he was clearly of opinion that the action could not be maintained. It was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bona fide*, with a view to the

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It has likewise been decided, that it is not libellous to ridicule a literary composition, or the author of it, in so far as he has embodied himself with his work; and that if he is not followed into domestic life for the purposés of personal slander, he cannot maintain an action for any damage he may suffer in consequence of being thus rendered ridiculous. *Sir John Carr, Knt.* v. *Hood* and *another*. 1 *Camp. Rep.* 355.[z]

interests of himself and the persons whom he addressed; and if a communication of this sort, which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted. His Lordship referred to a case of *Cleaver* v. *Sarraude*, tried on the northern circuit while he was at the bar, where, in an action like the present, it appeared that the letter had been written confidentially to the Bishop of Durham, who employed the plaintiff as steward to his estates, to inform him of certain supposed mal-practices on the part of the plaintiff; upon which the judge who presided, declared himself of opinion, that the action was not maintainable, as the defendant had been acting *bona fide;* and the nonsuit which he directed had been acquiesced in, from a conviction entertained by the plaintiff's counsel of its being founded in law. The parties consented to withdraw a juror. Hilary Term, 44 Geo. III. 1808; 1 *Camp, Rep.* 267, *M'Dougall* v. *Claridge*. *Dunman* v. *Bigg, T. T.* 48 *G. III.*

[z] The declaration stated, that the plaintiff, before the publishing of any of the libels therein-after mentioned, was the author of, and had sold for divers large sums of money, the respective copyrights of divers books respectively published in 4to. yet that defendant intending to expose him to, and to bring upon him great contempt, laughter, and ridicule, falsely and maliciously published a certain false, scandalous, malicious, and defamatory libel, in the form of a book, of and concerning the said Sir John, and of and concerning the said books of which the said Sir John was the author as aforesaid, which same libel was entitled, "My Pocket Book, or Hints for a Ryghte, Merrie, and Conceited Tour, in quarto, to be called the Stranger in Ireland in 1805;" the declaration set out other particulars, and concluded by laying a special damage, that the said Sir John had been prevented and hindered from selling to Sir Richard Phillips, Knt. for a large sum of money, to wit 600*l.* the copyright of a certain book or work of him the said Sir John, of which the said Sir John was the author, containing an

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But in cases of this kind the law will always distinguish between the spirit and liberal freedom of criticism and the malice of a libel. The question will always be, *quo animo* the defendant has been actuated? Has his object been to put down a nuisance to literature, or to prejudice the plaintiff.—" Liberty of cri-

account of a tour of him the said Sir John through part of Scotland, which, but for the publishing the said false, scandalous, malicious, and defamatory libels, he the said Sir John would, could, and might have sold to the said Sir Richard Phillips for the said last-mentioned sum of money.—Plea,—Not Guilty.

Lord Ellenborough, as the trial was proceeding, intimated an opinion, that if the book published by the defendants only ridiculed the plaintiff as an author, the action could not be maintained.

The counsel for the plaintiff allowed, that when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works; but that criticism must be fair and liberal; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and to ruin the prospects of an individual. The object of the book published by the defendants clearly was, by means of immoderate ridicule, to prevent the sale of the plaintiff's works, and entirely to destroy him as an author. In the late case of *Tipper* v. *Tabart*, 1 Camp. 352, his Lordship had held that a publication by no means so offensive or prejudicial to the object of it, was libellous and actionable.

Lord Ellenborough.—In that case the defendant had falsely accused the plaintiff of publishing what he had never published. Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer in exposing the follies and errors of another, may make use of ridicule however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuriâ*. Where is the liberty of the press if an action can be maintained on such principles? Perhaps the plaintiff's Tour through Scotland is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke?

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cism," says Lord Ellenborough, "must be allowed, or we shall neither have purity of taste or morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel, which has

but shall it be said that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it: this would tend to the perpetuity of error. Reflection on personal character is another thing. Shew me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I should be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule.

The counsel for the plaintiff still complaining of the unfairness of this publication, particularly of the print affixed to it, the trial proceeded.

The Attorney-General having addressed the jury on behalf of the defendants,

Lord Ellenborough said, "Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purposes of slander, that would have been libellous; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them,—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profit to which

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for its object, not to injure the reputation of any individual, but to correct misrepresentations of facts, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." *Tabbart* v. *Tipper*, 1 *Camp.* 352.

But although it is lawful for an author to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it is actionable falsely to impute to him the publication of any immoral or absurd literary production. *S. C.*

It is not a libel for the editor of a public newspaper to comment fairly on any place of public entertainment, or on any public performer. But if done maliciously, and untruly, it becomes the subject of an action. *Dibdin* v. *Swan*, 1 *Esp.* 1 N. P. 28.*

he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold."—The Chief Justice concluded by directing the jury, that if the writer of the publication complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it any thing personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly.—Verdict for the defendants.

* This was an action against the defendants for a libel.

The plaintiff was the proprietor of a place of public entertainment called Sans Souci, where he sang and performed certain songs which were supposed to be written and composed by himself.

The defendants were the editor and printer of a public newspaper called The World. The libel for which the action was brought, was a paragraph which appeared in that paper, insinuating that the songs were not in fact written by the plaintiff, but by a person of the name of Bickerstaff, with whom the plaintiff had formerly been connected in bringing out several musical pieces, which had been performed with a considerable share of applause. The paragraph further mentioned, that on the first night of the

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In respect indeed to public entertainments, the right of fair examination, as applied to the performances and the merits of actors, is part of the privileges which the frequenter of such places purchases with his ticket. It is a part of the contract which he makes with the managers, and the managers with him. It is moreover an useful, and what is the main legal consideration in all imperfect rights of this kind, it contains nothing in it dangerous to the public peace, so long as confined to its proper object. But if it trespasses beyond its just end, and becomes either malicious, or inciting to disorderly clamour, it is both an injury to the individual, and an undoubted interruption of the public peace. The review of books, and written censures upon authors, fall under the same general reasoning. They are allowed,

performance there had been a very thin audience, and that composed of persons admitted under orders: that the music of the songs was of very inferior composition, and that the applause bestowed on the performance was only from the persons who had so gained admittance; whereas the songs, both as to the words and music, were the composition of the plaintiff only—There was, in truth, a very full audience, and the applause was genuine, and from persons no way connected with the plaintiff.

Lord Kenyon stated the law on this subject to be—that the editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment; but it must be done fairly, and without malice or view to injure or prejudice the proprietor in the eyes of the public. That if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, malevolent, or exceeding the bounds of fair opinion, that such is a libel, and therefore actionable.

Case will not lie by the proprietor of a place of public amusement for libelling a performer, who was thereby prevented from appearing, by which he lost the profits of his performance; the said performer being deterred by such libel from appearing on the stage. *Ashley* v. *Harrison*. 1 *Esp.* N. P. 48. *Peake's* N. P. 194.

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when fair and just, on account of the general interest which every society must be presumed to have in sound literature; but when such criticisms are evidently malicious, or such as the law presumes to be so, from their exaggeration and manifest injustice, whether from the malice, insufficiency, or culpable negligence of the critic; all such criticisms, being a clear injury, would be undoubtedly libellous.

OF LIBELS WHICH TEND TO INJURE A MAN IN HIS TRADE OR EMPLOYMENT.

Every man has a right to the fruits of his industry, and, by a fair reputation and character in his particular business, to the means of making his industry fruitful. At common law therefore an action lies for words which slander a man in his trade, or defame him in an honest calling. As to say of a merchant or tradesman, *he is a bankrupt*. 1 *Rol.* 61, *pl.* 35, 40. So to charge a man with *deceit in his trade;* or other mal-practice. 1 *Rol.* 59, 62. But words, not actionable in themselves, did not become actionable when spoken of a man in his trade, unless it were shewn by a colloquium, or special averment, that they touched him therein. *Ray.* 75.

In regard to defamation which affects a man in his *trade,* the same rule applies to written as to parole slander; though defamation, when written, may be actionable, under certain circumstances, when the same words, if spoken, would not.[b]

[b] In an action upon the case for a libel, the plaintiff declared that he had obtained a patent to be gunsmith to his royal highness the Prince of Wales, and that it having been advertised in one of the public newspapers called the Craftsman, that he had the honour of making for and presenting to his

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The law, however, respects communications made in confidence, notwithstanding they may be false and erroneous, and prove injurious to the party. But if the communication be malicious as well as false, and under the cloak of private confidence be meant to defame, it is no longer within the protection of the rule.

royal highness a gun of two feet six inches long in the barrel, which would carry as far as guns of a foot longer in the barrel, made by any other person of that trade; that it was so much approved, that the plaintiff had the honour of kissing his royal highness's hand; and that the defendant falsely and maliciously, and with an intent to scandalize the plaintiff in his art and profession, did, 4th January, 1741, in the said public paper publish and advertise of the plaintiff, concerning his said art and profession, *inter alia* to this purpose: "Whereas there was an account lately in the Craftsman, of Mr. John Harman, gunsmith, his making guns of two feet six inches in barrel, to exceed any made by others of a foot longer (with whom it is supposed he is in fee); this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any other artist in town, nor even did he make any experiments, but out of a leather gun, as any gentleman may be informed at the Cross Guns in Long-Acre," being the defendant's shop, by which the plaintiff lost several customers to his damage. After not guilty pleaded, there was a verdict for plaintiff, and 50*l.* damages.

It was moved in arrest of judgment, that the advertisement in the newspaper was no libel, and that if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their credit in the same way; and the court held, that though the defendant or any other of the trade might counter advertise what was published of the plaintiff, viz. that he could do more than any other man of the trade, yet that should have been done without any general reflections on him in the way of his business: that the defendant had not contained himself within these bounds, fort that the advice to all gentlemen to be cautious, was a reflection on his honesty, as if he would deceive the world by a fictitious advertisement, and had a plain tendency to discourage people from dealing with him; and the allegation that he would not engage with any other artist in town, was setting him below the rest of his trade, and calling him a bungler in general terms, and not relative to the precedent matter; it was charging the plaintiff with being the last of his trade, for the words not daring to engage, &c. stand independent of the words next following, viz. nor did he

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An action will not lie by a servant against his former master, for a letter written by him, in giving a character of the servant, unless the latter prove the malice, as well as falsehood of the charge; even though the master make specific charges of fraud. *Edmonson* v. *Stephenson*, *Bull.* N. P. 8; and *Weatherston* v. *Hawkins*, 1 T. R. 110.

So communications which respect a man's trade, when confidential, are not actionable. Thus *A*, may lawfully state to *B*, in an unreserved manner, his opinion of *C*'s conduct and character, provided it be done *bona fide*, whatever may be the charges which are imputed to him.

This rule, or rather limitation with respect to the general law of libel, applies equally to words written and spoken. It is meant to protect the communications of business, and the necessary confidence of man in man.[c]

ever make the said experiment, &c. so that he was charged generally with the want of skill; that the words, except out of a leather gun, was charging him with a lie, the word gun being vulgarly used for a lie, and gunner for a liar; and that therefore the words were libellous: the plaintiff had judgment, the court being of opinion that it tended to discredit him in his business. Easter Term, 4 Geo. II. 1731. 2 *Stra.* 888, 899. *Barnard.* K. B, 289, 438. *Fitzgib.* 121. pl. 6. 253. pl. 2. 3 *Bac.* Abr. 491, 492. 4 *Bac.* Abr. 494. *Harman* v. *Delany*.

[c] Action for words. Plea, not guilty. The plaintiff was a dealer in beer, buying it of brewers, and selling it to publicans. Wishing to open an account with the defendant, a brewer, one Leigh became his surety for the price of such quantities of beer as should from time to time be supplied to him, the defendant promising to inform Leigh of any default in his payments made by the plaintiff. After the parties had dealt together for some time, the defendant went to Leigh, and spoke to him in very opprobrious terms of the plaintiff; saying, that he wished to cheat him, that he had sent back, as unmerchantable, beer which he himself had adulterated; that he was a rogue and a rascal, &c., At this period there was a sum of

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OF LIBELS WHICH EXPOSE A MAN TO RIDICULE, SCORN, &c. &c.

The next class of libels is that, which by holding up a man to scorn and ridicule, and, still more, to any stronger feeling of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence, which man has with respect to man.

money due from the plaintiff to the defendant, in respect of the beer for which Leigh had given a guarantee.

Lord. Ellenborough.—I am inclined to think that this was a privileged communication. Had the defendant gone to any other man and uttered these words of the plaintiff, they certainly would have been actionable. But Leigh, to whom they were addressed, was guarantee for the plaintiff; and the defendant had promised to acquaint him when any arrears were due. He therefore had a right to state to Leigh what he really thought of the plaintiff's conduct in their mutual dealings; and even if the representations which he made were intemperate and unfounded, still if he really believed them at the time to be true, he cannot be said to have acted maliciously, and with an intent to defame the plaintiff. To be sure, he could not lawfully, under colour and pretence of a confidential communication, destroy the plaintiff's character and injure his credit: but it must have the most dangerous effects, if the communications of business are to be beset with actions of slander. In this case the defendant seems to have been betrayed by passion into some unwarrantable expressions. I will therefore not nonsuit the plaintiff; and it will be for the jury to say, whether these expressions were used with a malicious intention of degrading the plaintiff, or, with good faith, to communicate facts to the surety which he was interested to know. The parties agreed to withdraw a juror.—*Trinity Term*, 48 Geo. III.; 1 *Camp. Rep* 269, *Dunman* v. *Bigg*.

A libellous letter addressed to the party himself is not actionable, though it may be the subject of an indictment. *King* v. *Cator*. *Esp*. N. P. Vol. 4, p. 117.

This was an action for words, with a count for a libel on the plaintiff.

The declaration stated that the plaintiff was an attorney; and the libel as well as the words were laid as written and spoken of him as an attorney, and actionable as referring to his profession.

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It is chiefly in this branch of libels, that the action for words spoken, and for words written, substantially differ. The common law, in respect to our natural passions, gives no action for mere defamatory words, which it considers as transitory abuse, and not having substance and body enough to constitute an injury, by affecting the reputation. It confines, therefore, the action for slander, to such of the grosser kind of words

The facts of the case, as proved on the part of the plaintiff were these: the plaintiff had been employed as attorney to one Neate, to sue the defendant for a debt due to him. The defendant consented to pay the debt and costs. He received the plaintiff's bill of costs; but considering it as exorbitant, he sent the amount of the debt and costs, accompanied with a letter to the plaintiff, to the following effect: "I have sent you the money; but I desire to have a bill, in order that I may have it taxed, to shew the world how villanously you have conducted yourself." This letter was the libel charged in the declaration.

The words proved were, "I have taken out a judge's warrant to tax Phillips's bill: I'll bring him to book, and shall have him struck off the roll."

Lord Kenyon ruled these words not to be actionable. His lordship added, "had the words been, 'He deserves to be struck off the roll,' they would have been actionable; but here they were spoken only with reference to the overcharge in the bill."

The plaintiff proved the defendant's hand-writing to the letters, and the delivery to him.

On this evidence, the counsel for the defendant, objected: that the manner in which the supposed libel was proved to have been published, was not actionable. He admitted that it might be the object of an indictment, as tending to incite the plaintiff to break the peace; but that the libellous matter being contained in a private letter, addressed to the plaintiff himself, and only delivered into his own hands, was not that publication which the law required to constitute a libel, upon which an action could be maintained. To make a private letter a libel, it must be addressed to a third person, not to the party himself, otherwise no action could be maintained.

Lord Kenyon assented that the law was as stated; and the plaintiff was nonsuited. *Phillips* v. *Janson*, 38 Geo. III. 2 *Esp.* 623.

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as impute positive crimes, or by charging a man with contagious disorders, tend to expel him from society,—and to words which injure him in his profession and calling. It does not consider words amounting to a breach of the peace, and therefore gives neither indictment nor information for unwritten slander, except in the case of seditious language, or words reflecting on a magistrate in the immediate execution of his office.

The reason of the law in this distinction is simple enough. It was necessary to punish the grosser and more palpable injuries, and it was equally convenient to pass over the less. The law, therefore, by classing the greater injuries, established the *criteria* of this distinction, and adhered to it closely in its practice. This reason however ceased, when the words, by being written, could no longer be considered as the results of transitory passion or venial levity, but therein gained the shape and efficacy of a mischievous malignity.

The act of writing is in itself an act of deliberation, and the instrument of a permanent mischief. What before was mere *convitium*, and contumely, grew into a deliberate charge and accusation. The law, therefore, both with respect to the public peace, and the prevention of private injury, allowed an indictment and information, as well as an action on the case, for words written, which it denied to words spoken.[4]

[4] Many cases prove, that the same words, when written, are actionable, which are not so when spoken. Where words directly tend to the breach of the peace, as if one man challenge another, they are indictable; but for mere ill language, as we have above said, there is no remedy. It is a restraint belonging to manners. But for small offences committed by words,

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As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations as tend to lessen him in the esteem of the world, and, by the sure effect of ridicule, to cast a shade upon his talents and virtues, it has been holden, that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous and ignominious light; for these reflections equally create ill blood, and provoke the parties to acts of revenge, and breaches of the peace.

Every thing, therefore, written of another, which holds him up to that scorn and ridicule that might reasonably (that is, according to our natural passions), be considered as provoking him to a breach of peace, is a libel.

And, in the same manner, all such written abuse as may be fairly intended to impair him in the enjoyment of society, or to throw a contempt on him which might affect his general fortune and comfort, is a positive injury, and therefore the subject of an action on the case.

" Scandalous matter is not necessary to make a libel. It is enough if the defendant induce an ill opi-

which are *contra bonos mores*, the law has another provison, by requiring surety for the peace and good behaviour. 2 *Salk.* 697, 8; 3 *Salk.* 190. *Holt Rep.* 654.

Words tending to defame a magistrate in the execution of his office are indictable as well as actionable. *Andr.* 384. Many words are indictable which are not actionable, if against *bonos mores*, or the public peace. *Comberback*, 66. But it should seem that when words are actionable, no indictment is given. *Comb.* 13. *Rex* v. *Freaker*. In this case the defendant was indicted for calling one a *thief*. Objection taken, that it is actionable at common law. The indictment was quashed.

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nion to be had of the plaintiff, or to make him contemptible and ridiculous." *Per Lord Holt.* *Cross* v. *Tilney*, 3 *Salk.* 226.

Thus, to say of any man he is a *dishonest man*, is not actionable, but to publish so, or put it upon posts, is actionable. *Skinner*, 124.

An action was brought for dispersing a paper, accusing a gentleman, that he should say, " He could see no probability of the war ending with France, till the little gentleman on the other side of the water was restored to his rights"—*innuendo* the Prince of Wales. *Per Holt, C. J.* A man may justify in an action on the case for words, or for a libel, *secus* in an indictment. In case upon a libel, it is sufficient if the matter is reflecting—as to paint a man playing at cudgels with his wife. *Brown* v. *Dyer*, 11 *Mod.* 99.

Where a ticket was delivered by a person to a minister after sermon, wherein he desired him to take notice, that offences passed now without controul from the civil magistrate, and to quicken the civil magistrate to do his duty, &c.; this was holden to be a libel, because it tended to spread a general contempt upon the magistrates, though no magistrates in particular were mentioned. *Sid.* 219; *Keb.* 773; *The King* v. *Prin.*

We have already said, that a libel is either *scriptis, aut sine scriptis.* In a larger sense the notion of a libel may be applied to any defamation whatever, expressed either by signs or pictures, as by fixing up a gallows against a man's door, and by painting him in a shameful or ignominious manner. 5 *Coke*, 125; *Skin.* 123, 124; *Hawk.* P. C. c. 73, § 2.

C. forged an order of Chancery, in which were seve-

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ral defamatory expressions against the plaintiff, and at the end draws a pillory, and subscribes it for Sir J. H. and his forsworn witnesses by him suborned; this is but one complicated act, and an action will lie. *Sir John Austin* v. *Col. Culpepper*, 2 *Shower*, 313.

In a special action on the case the plaintiff declares, that he is an hackney coachman, and the defendant, with intent to disgrace him, did ride Skimmington, and describes how, thereby surmising, that his wife had beaten him, and by reason thereof persons, who formerly used him, refused to come into his coach, *ad damnum*. Upon not guilty, it was found for the plaintiff, and upon motion in arrest of judgment, judgment was *Quod querens nil capiat per billam*. *Raym.* 401. *Trin.* 32. *Car.* 2. *B. R. Mason* v. *Jennings*.

So carrying a fellow about with horns, and bowing at *B's* door. 2 *Show.* 314, cites *Sir William Bolton* v. *Dean*.

As it has lately become a question, whether there be any difference, in point of law, between written and unwritten slander, we shall pass to an examination of the more modern cases on this subject. It must unavoidably be done at some length.

In an action for a libel, Lord Hardwicke made two questions, 1st, Whether the words, which it is not necessary here to repeat, were actionable if spoken? 2d, Whether actionable when written? As to the latter question, he said, there is no necessity to touch on it; but undoubtedly courts do make a distinction between words written and bare words. His lordship puts actions and indictments for libels precisely on

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the same footing. *Bradley* v. *Methuen.* 2 *Ford's MS.* 78.

In *Villars* v. *Monsley*, it was holden that an action would lie for publishing any thing in writing which tends to render another ridiculous.*

* This was an action upon the case against the defendant, for maliciously writing and publishing a libel upon the plaintiff, in the words following, viz.—

"Old Villars, so strong of brimstone you smell,
"As if not long since you had got out of hell,
"But this damnable smell I no longer can bear,
"Therefore I desire you would come no more here;
"You old stinking, old nasty, old itchy old toad,
"If you come any more you shall pay for your board,
"You'll therefore take this as a warning from me,
"And never more enter the doors, while they belong to J. P.
"*Wilncout, December* 4, 1767."

The defendant pleaded not guilty; and a verdict being found for the plaintiff, and sixpence damages, it was moved in arrest of judgment, that this was not such a libel for which an action would lie. *Sed per curiam:* this is such a libel for which an action well lies. We must take it to have been proved at the trial, that it was published by the defendant maliciously; and if any man deliberately and maliciously publishes any thing in writing concerning another, which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher. There is no difference between this and the cases of the leprosy and plague; and it is admitted that an action lies in those cases. The writ *de leproso amovendo* is not taken away, although the distemper is almost driven away by cleanliness, or new invented remedies: the party must have the distemper to such a degree before the writ shall be granted, which commands the sheriff to remove him without delay, *ad locum solitarium habitandem ibidem prout moris est, ne per communem conversationem suam hominibus damnum vel periculum eveniat quovismodo.*—Registrum Brevium, 267, 6.—The degree of leprosy is not material, if you say he has the leprosy it is sufficient, and the action lies. The reason of that case applies to this; the itch may be communicated by the air without

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A letter written to a third person, calling the plaintiff "a villain," was holden actionable, without proof of special damage.[f]

contact: it is said to be occasioned by animalcula in the skin, and must be cured by outward application; nobody will eat, drink, or have any intercourse with a person who has the itch, and stinks of brimstone, therefore this libel is actionable, and judgment must be for the plaintiff. Though for saying a man has the itch, without more, perhaps an action would not lie without other malevolent circumstances; for there is a distinction between libels and words: a libel is punishable, both criminally and by action, when speaking the words would not be punishable either way. For speaking the words rogue and rascal of any one, an action will not lie; but if those words were written and published of any one, an action will lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them maliciously, as in the present case, no doubt but the action well lies. Judgment for the plaintiff *per tot. Cur.* without granting any rule to shew cause. *Villars* v. *Monsley. Easter Term,* 9 *Geo. III. C. B.* 2 *Wils.* 403.

[f] On the trial of an action on the case for defamation, it appeared that the defendant had written the following letter of and concerning the plaintiff:—"After the communication I had with your son in your absence, I but little thought you would have been made the dupe of one of the most infernal villains that ever disgraced human nature; but I suppose you were deceived by those whom you thought well of, and whom he will deceive if they will give him an opportunity: I am told they are respectable, and how they can be connected with him is the most astonishing thing to me. Mr. H. writes me you called upon him (meaning the plaintiff) on the subject of your account, for which the villain gave you his note at five months." The declaration stated, that the plaintiff had sustained special damages, and the plaintiff having failed in proving the special damage laid, Macdonald, C. B. was of opinion, that the letter, unsupported by proof of special damage, was not actionable, and directed a verdict for the defendant.

The counsel for the plaintiff, however, contending that the letter itself was actionable, the Chief Baron asked the jury what damages they would give, supposing the plaintiff entitled to a verdict in point of law? The jury answered one shilling. Afterwards, on a motion to set aside the verdict for the defendant, and to enter a verdict for the plaintiff for one shilling, the court were clearly of opinion, that any words written and pub-

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There are other cases to this point. In *Janson* v. *Stuart*, it was holden, that to print of any person, "*He is a swindler*," was actionable. 1. T. R. 748. By referring to that case, however, it will be found that the words charged amounted to an indictable offence; it was the accusation of a public fraud. But it has been holden, that simply to say of another, "*You are a swindler*," is not actionable. *Saville* v. *Jardine*. 2 *H. Black*. 531. Upon this point, see likewise 4 *Com. Dig. title libel* A. *Fitzgibbon*, 121, 253. *Harman* v. *Delany*.

But where there is no imputation on the moral character of the plaintiff; no words of ridicule or contempt; nothing which can affect his reception in life; or exclude him from general society, it is no libel; as in the following case for publishing a libel. The words were these:—"The Rev. John Robinson, and Mr. James Robinson, inhabitants of this town (Southwold), not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room." This libel was published in the Cassino Room at Southwold, by posting a paper on which they were written. The defendant demurred to the declaration.—The court of Exchequer, on argument, held, that the paper, and mode of promulgating it, did not amount to a libellous publication. Because 1st, It did not, by any necessary or probable implication, affect the moral fame of the plaintiff.—2d, That it was the regulation of a subscription assembly; and the

lished, throwing contumely on the party, 5 *Co.* 125, 6, were actionable, and made the rule absolute. *Bell* v. *Stone*, Mich. Term, 39 Geo. III. C. B. 1 *Pul.* and *Bos.* 331.

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paper might import no more than that the plaintiff was not a social and agreeable character, in the intercourse of common life.—3. That the words charged him with nothing definite; threw no blemish on his reputation; and implied no unfitness for general society. 1 *Price's Reports*, p. 11, *Robinson* v. *Jermyn* and *others*.

It has lately, as we have observed above, been questioned in several cases, whether the law gives an action for words written, which words, if barely spoken, could not sustain the common action for slander. The aim, indeed, has been to put upon the same footing and equality written and unwritten slander, when the individual affected by the defamation sues for damages by action.

In *Thorley* v. *Lord Kerry*, which was decided in the Exchequer Chamber, upon a writ of error, brought to reverse the judgment of the court of King's Bench, this point has been at length settled.[s]

[s] The judgment of the court was pronounced by the Chief Justice of the Common Pleas in the Exchequer Chamber, E. T. 1812. It states the case so much at large, that it is unnecessary to enter into it further.

Chief Justice Mansfield.—" This was a writ of error brought to reverse the judgment of the King's Bench. It was an action for a libel published in a letter, which the bearer of the letter happened to open. The words of the supposed libel were to this effect:—" *I pity the man* (meaning the plaintiff) *who can so far forget what is due to himself and others, as under the cloak of religion to deal out envy, hatred, malice, uncharitableness, and falsehood.*" No doubt this was a libel for which the defendant at law might have been indicted and punished, because, though the libel imputes no punishable crimes, it contains that sort of imputation which is calculated to vilify a man, and to bring him, as the books say, into hatred, contempt, and ridicule. For all words of that description an indictment lies; and I should have thought, that the peace and good name of individuals were

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It was once, indeed, a matter of doubt, whether the sending of an abusive letter, filled with provoking language to another, would maintain an action for a libel, because there is no publication. But the sending of such letter, without other publication, is clearly an

sufficiently guarded by the terror of this criminal proceeding in such cases. But the question now is, whether an action will lie for these words so *written*, when such an action would not lie for them if *spoken?* I am very sorry it was not discussed in the King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction between written and parole slander. For myself, after having heard it extremely well argued, I cannot, upon principle, make any difference between words written (as to the right which arises out of them of bringing an action) and words spoken. For the plaintiff in *error* it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander, as far back as the reign of Charles the Second; and the difference has been recognised by the courts at least a century backwards. It does not appear to me, that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives; and the law gives a very ample field for retribution by action for words spoken, in case of special damage. For words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer, an action lies. In the arguments, both of judges and counsel, in almost all the cases, where the question has been, whether that which is contained in a writing be the subject of an action or not, it has been considered, whether the words, if spoken, would maintain an action. It is curious that they have always adverted to the question whether it tends to produce a breach of the peace. But that can be no ground for a private person suing to recover damages. Again it has been said, that writing shews a more deliberate malignity. But that can be no ground for recovering damages without shewing the injury. Again, it is urged, that written scandal is more extensively diffused. But an assertion in a public place, as on the Royal Exchange, of a merchant in London, may be much more extensive than a few printed papers dispersed, or a private letter. It is true, that a newspaper may be very generally read; but that is altogether casualty. These are the arguments which prevail on my mind to repudiate the distinction between written and unwritten scandal. The tendency and purport of an action are to recover compensation for

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offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and causes a disturbance of the public peace. 3 *Bac. Abr.* 193. The cases on this head of libel are very numerous. 2 *Barn. K. B.* 102; 2 *Kel.* 58; *The King* v. *Cator*, 2 *East Rep.* 361, and 4 *Esp.* N. P. 117.

So an endeavour to provoke another to send a challenge to fight is an indictable offence, particularly when such provocation is given by writing, containing libellous matter. *The King* v. *Phillips*, 6 *East.* 464. In this case the court of King's Bench observed, that to write to a man in a provoking manner, "You have behaved like a blackguard," gives the character of a libel to the letter. *S. C.*[h]

ome damage, supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer's mind, can have nothing to do with the question. If the matter were, for the first time, to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal, which could not be maintained for the words if spoken. But it has been established by some of the greatest names known to the law, by Lord Hardwicke, Hale, I believe, Holt, and others. Lord Hardwicke has expressly laid it down, that an action may be brought for a libel, when the words *spoken* would not maintain it. *Bradley* v. *Methuen*, 2 *Ford's MS.* 78. *Comyn's Digest* title *Libel*, referring to a case in Fitzgibbon, says, there is a distinction between defamation written and spoken. Putting it down there, as he does, as the law, without any question or doubt upon it, leads us to suppose that he was of the same opinion. I do not here recapitulate the cases, but we cannot now, in opposition to them, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if spoken. Upon these grounds, we think that the judgment of the King's Bench must be affirmed." *Thorley* v. *Lord Kerry*, *Exch. Chamb. B. T.* 1812. 4 *Taunton's Rep.* 355.

[h] This doctrine is fully supported by the case of the *Queen* v. *Langley*, *Salk.* 697; which was an indictment for saying to a mayor, "that he

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But the want of publication to others (the party being no witness in his own cause), excludes him from the remedy of an action on the case for such a libel. Lord Kenyon, in a case we have cited, sanctions this observation. *Phillip* v. *Janson*, 2 *Esp.* 623.

Information for writing a scandalous letter to one Hatton Rich, who was indebted to defendant in a large sum of money, of which he had delayed him three years, by obtaining a protection, &c. The words of the libel were, " If he (Hatton Rich) had any honesty, civility, sobriety, or humanity, he would not so deal with him, and that he one day would be damned, and be in hell for his cheating." On *Not guilty* pleaded,

was a rogue and a rascal; and which words were holden not indictable, because they did not tend directly to a breach of the peace. In the report of this case in *Salkeld*, the distinction is taken by *Holt*, C. J. "that if these words had been written, an indictment would have lain;" for as was said in 2 *Lord Raymond*, 1031, S. C. "*that was a libel*," *Vide Hick's case*, *Hob.* 215; where a libellous letter sent to the party himself was deemed a midemeanor, because it was a provocation to a challenge and breach of the peace. So according to 1 *Hawk.* cap. 63, § 3, it is a very high offence to challenge another, &c.; or even barely to provoke another to send a challenge or to fight; as by dispersing letters full of reflections, &c. But in *William King's case*, 4 *Inst.* 181, mere words of provocation, as *liar and knave*, though said to be motives and mediate provocations for a breach of the peace, were yet considered as not tending immediately to a breach of the peace; like a challenge to fight, or a threatening to beat another.

Lord Coke says, it was the opinion of the judges in the Lord Treasurer's case, when he was Attorney-General, that an abusive letter was punishable in the King's Bench, and therefore he had instructions to exhibit an information. *Resolved in Wooton* v. *Edwards*; *Popham*, 140.

Lord Bacon says, that the reason why such private letter is punished is, because, in a manner, it enforces the party to whom the letter is directed, to publish it to his friends, and thus induces a compulsory publication This species of offence was always punishable in the Star-Chamber. *Popham*, 189.

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and verdict for the king, an arrest of judgment was moved, assigning as a reason, that the subject of the letter was not scandalous, but shewed a zeal in the defendant to maintain the sense of the injury he had sustained.

Twisden, Justice.—" The letter is provocative, and tends to the incensing Mr. Rich to a breach of the peace, and therefore an information lies; and afterwards the court adjudged the letter scandalous, and the defendant was fined forty marks. *Sir T. Raym.* 201.

The cases already cited under this head are sufficient to explain the principle of the law in the variety of circumstances to which it has been applied, as connected with libels of this description. It has been shewn that no one can have a right to expose another to public scorn and ridicule, and the limits within which the law allows such exposure have been pointed out. But there are some cases under this division, in which the rule of law has been stretched widely, for the purpose of checking ludicrous and reproachful defamation, as in the cases cited in the note.[1]

[1] An information being moved for against the printer of " Lloyd's Evening Post," for a ludicrous paragraph, giving an account of the earl of Clanrickard's marriage with an actress at Dublin, and appearing with her in the boxes with jewels, &c. cause was shewn against making the rule absolute. 1st, That Lord Clanrickard was not a peer of Great Britain. *Sed non allocatur. For per cur,* as he is sworn to be a marrid man, it is a high offence, even against a commoner. 2dly, That this paragraph was taken from another paper, against whose printers informations were also moved. 3dly, That in his next paper, Kinnersley had voluntarily made a public recantation. *Sed non allocatur. For per cur,* it is high time to put a stop to this intermeddling in private families. Rule absolute. *The King* v. *Kinnersley, Trinity Term,* 1 Geo. III, B. R. 1 *Black. Rep.* 294.

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Having considered that species of libel which the law punishes, from its tendency to provoke or discredit a man by irritating or reproachful language, or unjust ridicule, we shall now pass to a short consideration of such libels as have a tendency to injure a person, though not as belonging to a profession, trade, or calling.

A. being very old, and having a good estate which he intended to settle on *B*, who was his heir general, *I S*, who had married a niece of *A*, wrote a letter to *A*, that *B* was not the son of one of the name of *A*, and

Thus a rule for an information was granted for reflecting upon a person who was unsuccessful in a law suit. 2 *Barnard*, K. B. 84.

An information was granted against the defendant for publishing a libel in the Critical Review, tending to traduce, vilify, and ridicule, admiral Knowles, and to insinuate that he wanted courage and veracity; and to cause it to be believed, that the said admiral was of a conceited, obstinate, and incendiary disposition, &c. The defendant was convicted of this libel, and punished by imprisonment. *The King* v. *Doctor Smollett*, 32 Geo. II. 1759. K. B.

The defendant was indicted for sending to lady Caroline Fox, wife of Henry Fox, one of his Majesty's Privy Council, a certain scandalous paper, intituled, "The case of the orphan and creditors of John Ayliffe (who had been hanged for felony), for the opinion of the public, with an *addenda* of interesting queries for the answer of those it concerns. The libel grossly reflected on Mr. Fox, and the indictment alleged, "that it tended to disturb the peace and happiness of the said Henry Fox, and to extort money to himself, the said defendant." *The King* v. *Bonnell*, 1 Geo. III. 1761 K. B. See likewise the case of *The King* v. *Thickneese* 3 Geo. III. 1765 K. B. *Digest of the Law of Libels.*

The cases are very numerous on this head of libel, and it is unnecessary to cite more.

An information was lately granted against several newspaper printers, for a libel on the bishop of Derry, contained in a paragraph which represented him as a "*Bankrupt.*" The author of this libel was given up, and convicted at the trial. K. B. *Hil. Term*, 1812.

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was a hunter of taverns, and that divers women followed him from London to his house, and desired to hear of *A*'s death, and that all his estate would not pay his debts, &c. and signed it and sent it sealed and directed to *A*. This was held to be a libel, and *I S* was fined 200*l.* and *B* left at liberty to bring his action at law. 2 *Brownl.* 151; *Pasch.* 10 *Jac.* C. B. *Peacock* v. *Sir George Reynell.*[k]

But the court observed,—had the letter been directed to the plaintiff himself, and not to *A*, it would not have been a libel. *Ibid,* 152. Or if it had been directed to a father for reformation of any acts of his children, it would be no libel; for it is only for reformation and not for defamation; for if a letter contain scandalous matter, and be directed to a third person, if it be reformatory, and for no respect to himself, it shall not be intended a libel; for the mind with which it was made is to be respected; as if one write to a father scandalous matter concerning his children, giving notice thereof to the father, and advising him to have better regard to them; this is only reformatory without any prospect of profit to him that wrote it, but in this case, the defendant intended his profit and his own benefit; and this was the difference. 2 *Brownl.* 152, in S. C.

[k] A young lady, a few years since, recovered 4,000*l.* damages for reflections upon her chastity, published in a newspaper, though she could not, without alleging special damage (as loss of marriage), have maintained an action for verbal slander, containing the grossest aspersions on her honour: 3 *Christ. Black.* 126. And in Hilary Term, 1816, 2,000*l.* damages were recovered against the proprietor of a newspaper, for a libel upon a married lady, wherein she was accused of a criminal connection with an illustrious commander abroad. *Webster* and *Wife* v. *Baldwin, Com. Pl. M. P.*

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The law not only extends this exemption to the confidential communications of friendship, but to all such charges as necessarily exclude the suspicion of malice.

Thus where the matter complained of is admonition, or the discipline of a religious sect, it is not libellous.[1] There is a leading case on this subject in the note.

[1] The prosecutrix, Miss Mary Jerom, was educated among the Quakers, at the town of Nottingham; her parents, who lived there, being of that persuasion. There are several separate congregations of Quakers in this town; and once a month a general assembly is holden of them all. At these monthly meetings they take into consideration the conduct of such of their members as have not acted conformably to their rules; and proceed according to the direction of our Saviour in the 18th chapter of St. Matthew, v. 15, 16, and 17, which they call their discipline. If gentle admonitions in private have no effect, complaint is made to the monthly meeting; from whence a deputation is formally sent, to visit, and to endeavour to reclaim the party offending. And if these steps prove ineffectual, they proceed at last to a final sentence of expulsion; which is usually by some instrument or paper in writing, drawn up for that purpose, and openly read at one of the meetings for public worship. The person employed in this service is called the clerk of the meeting; and the writing, by which the society exclude and disown as their member the delinquent, generally set forth the cause of their proceedings, and the fruitless cares and endeavours of the society to reclaim. This has been their general practice since the Toleration Act; and at Nottingham as well as in many other places, they continue on this plan to this time. The prosecutrix having acted in disobedience to their rules, by frequenting places of public diversions, going into mourning for the death of a relation, and doing other things which they esteem unlawful, the method of admonition, and visitation by deputies, was taken by the society; and several conferences were had; but they proving ineffectual, and she absenting herself from their meetings, and declaring that she did not look upon herself as one of their body, the society at last (after several fruitless attempts to reclaim her for a year and a half) proceeded in their usual way to the sentence of expulsion, in the following words, which were reduced into writing, approved of by the monthly meeting, and afterwards read by the defendant Francis Hart, as clerk of the meeting, at the close of their meeting for worship, at Nottingham, on Sunday, September 6, 1761.

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The law of England, with a view to preserve the peace and happiness of families, which may be invaded and embittered by contemptuous reflections on the dead, has assigned a punishment for such libels as tra-

"Whereas Mary Jerom, of this town, was born of parents professing the same religious principles with us, and by them educated in our society; but not duly regarding the truth we profess, she imbibed erroneous notions contrary to Scripture doctrine, and in divers parts of her conduct acted very inconsistently with a life of self-denial, and of late years mostly neglecting meeting for divine worship, and when visited by friends appointed by our monthly meeting in love to her soul, and in order to reclaim her from error, and bring her to the acknowledgment of truth both in judgment and practice; but rejecting our labour of love, she declared that she did not look upon herself as a member of our society. We therefore hereby declare her not in unity with, nor a member of our religious society, until by unfeigned repentance she duly acknowledge Scripture doctrine, and behave agreeable to our holy profession; which that she may we sincerely desire. Signed in and by order of our monthly meeting, held at Nottingham, the fifth of the eighth month, 1761. By Francis Hart, clerk."

The prosecutrix being acquainted with this proceeding, sent her maid-servant to the defendant for a copy of this sentence, who accordingly transcribed it, and inclosed it in a cover directed to Mrs. Mary Jerom; who being thus possessed of it, annexed to it an affidavit, and applied to the court of King's Bench for an information for a libel. But the court rejected the motion, and refused to grant a rule to shew cause. She afterwards on the 12th of March, 1762, preferred a bill of indictment against the defendant for a libel, before the grand jury at the assizes held for the town of Nottingham, which bill being found by them, was afterwards removed by *certiorari* into the King's Bench, and the defendant having pleaded not guilty, it was tried at the summer assizes held for the town of Nottingham, July 30th, 1762. The jury found the defendant guilty.

In Michaelmas Term following, Mr. Cust moved the court of King's Bench for a new trial, and, after stating the above-mentioned facts, and observing upon the circumstances of hardship which would attend the case on a motion in arrest of judgment, where no facts could be relied on but such as appeared on the record, and after a verdict it might be presumed that a malicious intention to defame the prosecutrix (which was charged in the indictment) was proved,—insisting that the leaving such a

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duce the memory of the deceased, and have thus an obvious tendency to excite the resentment of the living. This principle, however, is never carried so far as to trespass on the utility of history, and the salutary freedom of the press therein. The court will always take into consideration the mind with which such publications are made, and discriminate the historian from the slanderer.

But an indictment[m] for publishing libellous matter,

case as this to a jury, would be enabling a jury to set up a judgment in opposition to the legislature, and overturn the Toleration Act; and therefore that the verdict ought to be set aside as a verdict against law.—The court was clearly of opinion, that the jury should have been directed to acquit the defendant; and, as notice of the motion was given, and counsel appeared for the prosecution, who did not contradict the above-mentioned facts, the court said they would not do so much credit to such a prosecution as to grant a rule to shew cause, and they ordered the verdict to be set aside, and a new trial to be had, on the first motion. *Michaelmas Term*, 3 Geo. III. 1763, K. B. 2 *Burn's Eccles. Law*, 779, *The King* v. *Hart*.

[m] This was an indictment reflecting on the memory of the late Earl Cowper, published in a newspaper called "The World:" the indictment charged "That the defendant, being a person of a wicked and malicious disposition, and wickedly and maliciously contriving and intending to injure, defame, disgrace, and vilify the memory, reputation, and character of George Nassau Clavering Earl Cowper, then deceased: and to cause it to be believed, that the said Earl, in his life-time, was a person of a vicious and depraved mind, &c. &c. did print and publish," &c. (setting forth the libel); and it concluded, "to the great disgrace and scandal of the memory, reputation, and character of the said Earl Cowper. In contempt," &c. &c. The jury found the defendant guilty. Afterwards an application was made to arrest the judgment. *Per curiam*. The question is, whether or not the judgment ought to be arrested? and that question is supposed to have some novelty in it.

The only judicial decision on this subject, which was cited at the bar, was that in 5 *Co.* 125; the case *de libellis famosis:* where it is said, that publications, defamatory of dead persons, are libellous; and the reason given is, because it tends to stir up others of the same family, blood, or

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reflecting on the memory of a dead person, not alleging that it was *done with a design to bring contempt on the family of the deceased*, and to stir up the hatred

society, to revenge, and to break the peace, by provoking them to vindicate the memory of the deceased, and to wipe off that stain which the reflections on the ancestor may cast upon them. But it is to be observed, that that was not the point in judgment; for it was a libel on the living archbishop as well as on his predecessor; and, therefore, the judgment for the former might well have been sustained, without going into the other point incidentally mentioned by the Court. In 1 *Hawk.* P. C. c. 73, § 3, it is said, "The chief cause, for which the law so severely punishes all offences of this nature (libels) is a direct tendency of them to a breach of the public peace, by provoking the parties, and their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which, of all others, are most sensibly felt." Now is it fit to compare the manner in which this indictment is drawn with others of a similar nature? This professes to be a libel, merely reflecting on the memory of the late Earl Cowper; and it does not state that it tended to excite his relations to revenge, and a breach of the peace. In other cases, particularly in those reflecting on King William, the indictment charged that they were published to slander the government, *Carth.* 405, with a view to counteract the revolution. We have seen the indictment in *Rex* v. *Critchley, Hill.* 7 Geo. II. (1); in which it was alleged, that the defendant, "intending to vilify and scandalize the memory of Sir C. Gaunter Nicoll, &c. and to induce a belief that the said C. Gaunter Nicoll had obtained the order of knighthood of the Bath by vile and scandalous means;" thereby reflecting on the government which has the distribution of honours; "that he had acted as an enemy to this kingdom, and had voted as a member of parliament, corruptly, and perniciously, contrary to his duty, &c. and maliciously to fix a mark of infamy, contempt, and dishonour, on the name and family of the said Sir C. G. Nicoll, &c. and to stir up the hatred and evil will of the subjects of the King against the family and posterity of the said Sir C. G. Nicoll." Now to say, in general, that the conduct of a dead person can at no time be canvassed, to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good; would be to exclude the most useful part of history. And, therefore, it must be allowed, that such publications may be made fairly and honestly. But, let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to

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of the King's subjects against them; and to excite his relations to a breach of the peace, cannot be supported.

vilify the memory of the deceased, and with a view to injure his posterity, as in *Rex* v. *Critchley*, then it comes within the rule stated by Hawkins: then it is done with a design to break the peace; and then it becomes illegal. But, on that question, the jury ought to have had the power to deliberate; something like that which was stated in Critchley's case, and in *Rex* v. *Horne*, should have been stated. We are, therefore, of opinion, that as nothing of that sort is stated in the prefatory part of this indictment, as that it was published with an intent to create any ill-blood, or to throw any scandal on the family and posterity of Lord Cowper, or to induce them to break the peace in vindicating the honour of the family, this judgment should be arrested. Rule absolute to arrest the judgment. *The King* v. *E. Topham, Hilary Term*, 31 Geo. III. B. R. 4 *Term Rep.* 127. Vide *The Queen* v. *Taylor*, 3 *Salk.* 198.

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CHAP. XIII.

ON THE CONSTRUCTION AND CERTAINTY OF A LIBEL.

UNDER this head, it may be necessary to treat shortly of the construction and certainty of a libel; and although our observations will apply to the offence generally, and are not confined to the matter of the preceding chapter, it will be more convenient with our arrangement of the law of libel to introduce them in the present place.

In order to entitle laws to the respect of mankind, not only the peace of life, but the substance and reputation of every subject, must be protected by them. The law chiefly regards the quality of every act, and if that be manifestly mischievous, it considers the means of little import. If the quality of a publication be to inflict an injury, the means which are used can make no difference in its legal imputation.

It would be therefore a strange defect in our laws, if there should be a certain style and method of writing, which a malicious man might adopt to the destruction of his neighbour's reputation, and with no inconvenience to himself. Whoever can think that any indulgence is due to a libeller who wraps himself up in mystery and obscurity, must reason as the Lacedemonians

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of old, who encouraged private theft in favour of ingenuity.

Our own laws, however, have been too benevolent and wise to suffer malice and slander to be administered under any disguise of style, and have always been directed by the two following maxims :[a]

1. That every thing in writing which implied, or was generally understood to imply, reproach, scandal, and ridicule, to any person or persons whatsoever, was a libel, and punishable either at the suit of the magistrate or the party injured.

2. And that the law was not be defrauded, and the punishment of the libeller evaded, on account of the mystery of his satire; but always proportioned to the mischief done, and the poison intended to be conveyed by it.

Therefore, not only scandal expressed in an open and direct manner, but also such as is expressed in irony, amounts to a libel; and the judges and juries are to understand it in the same manner as others do, without any strained endeavours to find evasions, or to palliate the offence, which in some measure would be to encourage scandal. Thus, where a writing in a taunting manner, reckoning up several acts of public charity done by one, says, "you will not *play the Jew*, nor the Hypocrite," and so proceeds in a strain of ridicule, to

[a] See *Digest of the Law of Libel*, p. 13. This is a most excellent and learned compilation, interspersed with many valuable observations by the unknown author. It is, however, without method; full of irregular learning, and a decided bias on the side of popular restraint. The work itself is rambling and confused, but it bears evident marks of the pen of an eminent lawyer, rather too careless for a digest, and above the drudgery of compilation.

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insinuate, that what he did was owing to his vain glory. *Hob.* 215, *S. C. Popham*, 139. In this case the court fined the defendant. Vide 3 *Bac. Abr.* 493. *Hawk.* Pl. Cr. 193, c. 73, § 4. *The King* v. *Brown.*

In an information for writing, &c. a libel, it was holden, that it lay for speaking ironically; and Lord C. Just. Holt said, it was laid to be written *ironice*, and the defendant ought to have shewn at the trial that he did not intend to scandalise; and the jury are judges *quo animo* this was done, and they have found the ill intent. 11 *Mod.* 86, pl. 5. 4 *Read. Stat. Law*, 151; *Barnard*, K. B. 305; 2 *Sess. Cas.* 80.

And upon the same reasonable grounds, it has been resolved, that a defamatory writing expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must necessarily be understood to signify *a certain* person in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling subtlety; and it is offensive to say, that a writing, which is understood by every one of the meanest capacity, cannot possibly be understood by a judge and a jury. *Trinity Term*, 12 *An.* 1711; *Hawk.* Pl. Cr. 194; c. 73. § 5, *The Queen* v. *Hurt.*

It is also clearly agreed, that any defamation whatsoever, expressed either by signs or pictures, comes within the notion of a libel; as by fixing up a gallows at a man's door, or elsewhere, or by painting him in a shameful or ignominious manner, as by exposing a man

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and his wife by a skimmington or riding, though a special custom be alleged for such practice. *3 Bac. Abr.* 490.

Open and sarcastical reproaches are allowed on all hands to be libels. Nothing then remains which may by any possibility evade the law but writing in allegory.

Let us examine what right has the allegorical style to escape better than the rest. If a man draw a picture of another, and paint him in a shameful posture, or ignominious manner, though no name be to it, yet if the piece be such, that the person abused is known by it, the painter is guilty of a libel. What then shall excuse the allegorical libeller? Abusive allegory in writing has a very near resemblance to this satyrical kind of painting: the man that is painted with a fool's cap or coat, or with horns, or whose picture is drawn with ass's ears, is certainly abused. *Wood's Inst.* 445. But, says the painter, he is disguised, and how can you pretend to know him? This is the very subterfuge of the writer of allegory, and ought to have the same answer. If it be the common notion that this picture represent a certain person, the painter is answerable for the injury he inflicts. They that give birth to slander are justly punished for it. It would be a scandal to the laws, if the writers of libels, after having the ordinary instruments of malice wrested from their hands, could have recourse to a secure mode of slander, in the picture writings of the Mexicans, and the artful hieroglyphics of the Egyptians.

Pointing out any person under a character, and giving him the name of one famous in story, and then abusing and reviling the name and character so fixed, is certainly

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a libel of the same kind with that of the painters, and has been often so taken in our courts, pursuing therein the intention of the great Roman, who marks, *ad infamiam alicujus*, for the part which constitute the crime, in his definition of this kind of injury. *Inst. Just. Lib.* 4. *Tit.* 4.

The information against the printer of *Mist's Journal*, already cited in another chapter, confirms this doctrine.

From the reasons of the law, a libel in hieroglyphics is as much a libel, and as highly punishable, as an open invective. If it be really unintelligible to any one, it will pass for nonsense with every one; but if there be only a thin veil, or aukward disguise thrown over it, through which those who can see and observe may perceive the satire within, a court of law will examine it narrowly, and judge of it according to the intention of the maker, and the influence it may have upon the injured party's reputation. As scandalous words, if they be spoken in an unknown tongue, which none of the auditors understands, will not bear an action, because they do no injury, *Danv. Abr.* 146, pl. 1, 2; yet, if they are understood by the by-standers, are actionable, *ibid*, 162, pl. 5; so is the case of libels: if the world understand them to be such, the law will make the same construction; if the satire be not commonly understood, the law will not punish it.

From this ground it appears, that not only an allegory, but a rebus or anagram, which are still more difficult to be understood, may be a libel; and a court, notwithstanding its obscurity and perplexity,

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shall be allowed to judge of its meaning as well as other readers.*

The same doctrine has uniformly obtained in modern times, as in the case of *Woolnoth* v. *Meadows*. 5 E. R. 463. In which the court said, that slanderous words must be understood by the court in the same sense in which the rest of mankind would ordinarily understand them. Therefore, where one said of another, "that his character was infamous, &c.; that delicacy forbade him from bringing a direct charge, but it was a *male* child who complained to him;"—such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an *innuendo* to that purpose, which, it was admitted, could not enlarge the sense. And

* The defendant was indicted, for that he made, composed, and wrote a scandalous libel, against one Lambert a churchwarden, and others, wherein were these words:—"Here is three cockels in this place (meaning cuckolds) we now (meaning know) them well, he (meaning Lambert) is a nave (meaning knave) he cheats and rongs (meaning wrongs) the country, and is the cur of a son of a whore."—The defendant demurred to this indictment.

And Mr. Fazakerley moved for the defendant to have it quashed, because these words are not intelligible, and want a meaning, and therefore are not injurious to the prosecutor, nor indictable.

Lord Chief Justice Raymond.—"The present libel is plain to all men, and easily to be understood, and it would be hard that a court of justice must not understand that it is spelt badly, when all the world besides make no scruple to find the signification of the words; and if men were not to be punished for the speaking of these words, what an inundation of scandal would be let in upon us. And Mr. Justice Fortescue cited the case of *The Queen* v. *Hurt*, where the defendant was set in the pillory for a libel which had only the first and last letter of the name; for the court said, *they* would make it sense, and here the court gave judgment for the King. K. B. 2 *Sess. Cas.* 29, pl. 33. *The King* v. *Edgar*. *Bacon's* Abr. title *Libel*

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holden that such words could not be justified by any plea, naming, for the first time, the person from whom the defendant heard the complaint.

It is said by *Hawkins*, P. C. c. 73, § 9, that no writing whatever is to be esteemed a libel, unless it reflect upon some particular person. This position is unquestionably true, as it relates to the action on the case for slander, in which the party complaining must shew himself to be meant by the libel.—And in applying to the court for an information for a libel, it is necessary to shew that the party making application is designated in the libel. But an indictment lies for general imputations on a body of men, though no individuals be pointed out, because such writings have a tendency to inflame and disorder society, and are therefore within the cognisance of the law.

The rule, therefore, stated in the extent in which Hawkins states it, does not seem to be law. Vide *Bac.* Abr. title *Libel*, p. 453. Thus, books reflecting upon Christianity in general, are libels, as we have before shewn in the second chapter of this book. *Rex* v. *Woolston*, 2 *Str.* 834; *Fitzg.* 64. So, a treatise on hereditary right was holden to be a libel, though it contained no reflection on any part of the then government. *Rex* v. *Bedford*, 11 *St. Trial*, 121; *Gilb. Rep.* K. B. 297.[p] So, a scandal published of three or four, or any one or two of them, is punishable at the complaint of one or more, or all of them. *Poph.* 252, 254. *Rex* v. *Bedingfield*, 2 *Burr.* 984.

The defendant was charged in an information with writing a libel against the Protestant religion and bi-

[p] Cited in a former chapter.

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shops, *innuendo*, the bishops of England: he was found guilty; and in arrest of judgment it was offered, that the bishops libelled were not *English* bishops, nor could the *innuendo* support such construction; but the court thought the libel, though general, sufficiently certain and explicit to warrant them in overruling the exception. *King* v. *Baxter*, 12 *Mod.* 139; *Lord Raym.* 879.

An information was prayed for publishing a paper containing an account of a murder on a Jewish woman and her child, by certain Jews lately arrived from Portugal, and living near Broad-street, because the child was begotten by a Christian; and the affidavit set forth, that several persons mentioned therein, who were recently arrived from Portugal, and lived in Broad-street, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more: it was objected, that no information could be granted in this case, because it did not appear who in particular the persons reflected on were; and for this was cited *The King* v. *Orme*, *Trin.* 11 W. III. 3 *Salk.* 224, pl. 5. *Lord Raym.* 486, where an indictment was exhibited for a libel called *The Ladies' Invention*, and alleged to be to the scandal of several ladies unknown; and, after verdict for the King, judgment was arrested, because it did not appear who the persons reflected on were. *Sed per Cur.* Admitting that an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanour, and that of the highest kind; such sort of advertisements necessarily tending to raise

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tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible; and in this case was cited the case of *The King* and *Franklin*, where, though only the word ministers was used in the libel, yet, by suitable averments in the information, and proof made of them to the jury, they found those ministers to be ministers of state to his present majesty, and the defendant guilty. *The King* v. *Osborne*. *Trin.* 5 Geo. II. in B. R. *Ses. Cas.* 260. 2 *Barnard*, K. B. 138, 166. *Kel.* 230, pl. 183.[q]

In *The King* v. *Griffin* and *others*,[r] in which it was objected, that the names of certain trustees, who were part of the body prosecuting, were not mentioned, Lord Hardwicke observed, there are indeed authorities where in cases of libel upon persons in their *private* capacities, it has been holden necessary that some particular person should be named; but this was never carried so far as to make it necessray that every person injured by such libel should be specified. The omission of *cæteri fiduciarii* in this case would have been immaterial. The charge of abuses, upon the three persons specified only, being sufficient to maintain the information; and there is no danger of subjecting the defendants to other prosecutions for this offence. The conviction on this information will be a sufficient bar to any other, it being one single offence, though every

[q] As to the manner of making the averments, see *Rex* v. *Horne*, *Cowper*, 672. This case will be stated in the next chapter.

[r] This case has been already cited in this chapter, though for another point.

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person injured by this libel might have an action against the defendant in regard to the several and special damages each has sustained. Judgment for the King. *Rep. Temp. Hardw.* 39.

There has been no question raised on this point in modern days. Informations, at the suit of public bodies, upon the application of certain individuals presiding over them, have been frequently granted by the court of King's Bench. As in the case of the *King* v. *Hector Campbell*, for a libel on the College of Physicians. *Hil. Term*, 1808, K. B. and the *Governors of the Foundling Hospital* v *Bell and Decamp*, for a libel upon that body.* *T. Term*, 1808.

* The latter information was never tried. In the former, Mr. Campbell was convicted, and sentenced to pay a fine of 50*l.* and to suffer three months imprisonment.

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THE

LAW OF LIBELS.

BOOK III.

CHAP. I.

INDICTMENT.

HAVING already considered in the first and second books of this work the nature and several species of the offence of libel, we come next to the consideration of the remedies which the law has given, whether to the public or the individual, for the injury, in crime or damage, to either of them.

The remedies for libel are three:

1. INDICTMENT.
2. INFORMATION.
3. ACTION ON THE CASE.

An indictment is the common remedy for every crime and public injury, by common law or statute. The public, indeed, have no means of proceeding but by indictment, or what is tantamount to it, by information.

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All misdemeanors, therefore, to the prejudice of the public good, such as a libel against the government or magistrate, are subjects of indictment.[a]

It is given likewise at the suit of an individual for this offence, from its intrinsic nature, *i. e.* its tendency to a breach of the public peace. *Hawk.* P. C. c. 73, § 3.

As the object of this treatise is not the detail of ordinary practice, it would be impertinent to enter into the general nature of an indictment. It will be necessary, however, to speak to some points in which indictments for libels have a specific character of their own.

The general nature of an indictment is the declaration of a criminal act, and as the subject matter of the offence is a certain writing, *formally* presumed, from its intrinsic nature, to be used with an evil purpose, at such a time, and by such persons or person; so the requisites of such indictment are the correct exhibition of such writing, in words or substance, with the proper allegations of time and place, and a suitable description and filling up of such chasm of the libellous meaning, as may be left in imperfect and enigmatical terms in the libel itself.[b]

An act alleged in a libel may either be such as is simply, and in itself criminal, or such as becomes so by reference to extrinsic matter. If the libel allege that a man has committed perjury, the act alleged is evidently

[a] *Com. Dig.* Vol. IV. 370.

[b] Every indictment must contain a complete description of such facts and circumstances as constitue the crime. But except in certain cases, where technical expressions, having grown by long use into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation. *5 E. R.* 244.

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a crime *per se*, and therefore requires only, in the indictment, a simple declaration of the libel, without any prefatory allegations. But if the charge be not intrinsically libellous, and refer to precedent occurrences, or a general state of things, it is evidently necessary to describe such matters briefly in the indictment, as making a part of the act, and such allegations, being parts and qualities of the libel, it is necessary, when stated, to prove them.

There is a difference, however, which common reason makes in all descriptions of offences in indictment, between material and necessary, and impertinent and unnecessary averments. The previous good character of an individual is a presumption of the law, and it is not necessary to state in the indictment that the person libelled was of a pre-existing good reputation. So, the words *vi et armis*, though usually introduced in such indictments, are not necessary, being mere grammatical appositions to the general subject.*

* The defendant having been convicted on an information filed against him by his Majesty's Attorney-General for a libel, it was moved to arrest the judgment for two objections appearing on the information; 1st, That the information does not charge the offence to have been committed *vi et armis*; 2dly, That the libellous matter is not said to be false. The Court were perfectly satisfied that there was no weight in either of the objections. As to the first objection, they said that the passage in 2 *Hale*, pl. 187, is correct, namely, that the statute 37 Hen. VIII. did not extend to informations; but that an indictment for a libel before that statute, would have been good without the words *vi et armis*; for that a libel was not in itself an actual breach of the peace, but only tended to a breach of it. That the distinction taken in 2 *Hawk.* c. 25, § 90, between indictments for offences, which amount to an actual disturbance of the peace, as rescues, assaults, &c. and those for conspiracies, cheats, slanders, escapes, &c. was the true distinction; and that in the former only the words *vi et armis* was necessary. That, though some of the precedents in

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An information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is false.

It is evidently not necessary to state that libel is a crime, as the very existence of the indictment is a sufficient proof that the law so understands it. *Vi et armis et contra pacem* are mere terms of contumacy against the law, and are as applicable to the peaceable offences of nuisances, and inactive nonfeasances, as to treason or libel.

It is a material allegation, however, to state that the libel existed in that kind of shape, in which the law regards it as libel, that is to say, either in writing, printing, painting, &c.; in other words, having an existence *per se*, off the tongue.[4] But the technical word *published*

Tremaine contained the words *vi et armis*, yet that those words were omitted in the greater number of them, as well as in most of the precedents in modern times. That in *R.* v. *Eades*, *Trem.* 61, those words were omitted; and, though several objections were taken in arrest of judgment, vide 2 *Show.* 460, no objection was made on that account. Neither was any objection taken in *R.* v. *Tutchin*, 5 *St. Tr.* 527, for the omission of those words, though other objections were taken in that case. And that in *R.* v. *Franklin*, 9 *St. Tr.* 255, judgment was given against the defendant on an information for a libel, where these words were omitted. And that, as to the other objection, the greater number of precedents in late times was without the epithet false; and that the reason of the thing also was against the insertion of the word "false," because it is not necessary to prove the libel to be false. See also *Sterling, et al.* 1 *Lev.* 125, 6, where an objection to an information for a conspiracy, made in arrest of judgment for the omission of the words *vi et armis*, was overruled. *The King* v. *Bucks*, *Mich. Term*, 37 Geo. III. B. R. 7 *Ter. Rep.* 4.

[4] It is not infamous matter or words which make a libel; for if a man speak such words, unless they are written, he is not guilty of the making of a libel—writing is of the essence of a libel. *Lord Raym.* 416. 2 *Wils.* 403, 434.

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need not be used, if its place be supplied by a term, signifying any thing which the law deems an equivalent, *i. e.* the communication of the libellous symbol to a second or third person.*

* This was an error in the Exchequer-Chamber from a judgment in the King's Bench. The declaration was in an action on the case, 1st, For printing and publishing in the St. James's Chronicle a libel, grossly traducing the plaintiff in his capacity of a captain in the navy; 2dly, For printing and causing to be printed another similar libel. The defendant pleaded the general issue; and on the trial, the jury found a general verdict for the plaintiff with damages 500*l.* on which judgment was entered. The special error assigned was, that in the second count the defendant is only charged with the printing and not the publication of the libel, which, it was alleged, was insufficient to maintain the action. *Per curiam:* we are all of opinion to affirm the judgment; for, though we agree, 1st, that where there are two counts in a declaration, one perfect, and the other not so, general damages cannot be regularly given; see *Dyer* 369. b. 5 *Co.* 108. 10 *Co.* 31. *Cro. Car.* 127; and, 2d, that in actions for libels, if no publication is stated in the declaration, the count is bad; see *Hob.* 62, 115; yet we apprehend there is a publication sufficiently stated in the present case. There are various modes of publication, and no technical words are necessary to describe it. Words may be published by preaching, teaching, or advised speaking, even where the consequences are highly penal. A written libel may be published in a letter to a third person. The word palam has been holden to state a publication sufficiently: *Cro. Eliz.* 861. There are in *Rastall's Entr.* title *Action sur le case*, 13, *a*, two instances of constructive publications, by delivering letters to *A* and *B*, and by fixing them on the door of St. Paul's church. See also 3 *Cro.* 327, *Penson* and *Gooday*, and 2 *Lev.* 193. It is, therefore, sufficient, if there be stated in the declaration such matter as amounts to a publication (without using the formal word published), and the jury are upon the evidence to decide whether a publication be sufficiently proved or no.

Printing a libel may be an innocent act; but, unless qualified by circumstances, shall, *prima facie*, be understood to be a publishing: it must be delivered to the compositor, and the other subordinate workmen. Printing in a newspaper (as laid in the declaration) admits of no doubt upon the face of it. It shall be intended a publication, unless it be shewn that the newspaper so printed by the defendant was suppressed, and never published. It is stated, that he caused it to be printed; this confirms the fact of

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It is another material averment in an indictment, that the libel be stated to be *of and concerning* the party complaining. The omission of these words, or similar would be fatal to an indictment or a declaration; the law having fixed upon them as terms taking the libel out of generality, and giving it a special appropriation.

Thus judgment, in one case, was arrested after verdict, because it was not laid that the libel was *of and concerning* the plaintiff. *Str.* 934.[f]

But the words *malitiose*, *falso*, *seditiose*, &c. are not specifically necessary, being inferences which the law already makes from the intrinsic nature of the act, or being immaterial to the legal point of the indictment.[g]

publication, because it calls in a third person, as agent, to whom the libel must have been communicated. The introduction to this count states, that it was so printed, with a malicious intent to injure the plaintiff as aforesaid, which connects it with the introduction to the first count, which speaks of publishing the several libels, thereinafter mentioned, in the plural number. This is the legal as well as the grammatical construction of the words. The conclusion to the whole declaration states, that by means of the printing and publishing of the said several libels the plaintiff is greatly injured. In short, the count does not state generally, as it might have done, that the libel was published, but it expresses the particular mode of publication, viz. by printing in a newspaper. It thereby puts the publication in issue, and the jury have found it so. By such finding they have excluded the idea of innocent printing, for they have found it to be done maliciously, to the infamy and damage of the plaintiff. Judgment affirmed. *Baldwin* v. *Elphinstone*, Esq. in Err. in the *Ex. Ch. Tr. Ter.* 15 Geo. III. 2 *Black. Rep.* 1037.

[f] *Rex* v. *Marsden*, K. B. East. Term, 1815. In this case likewise, the judgment was arrested for the like omission; notwithstanding it was alleged in the introductory part of the indictment, that the libel in question was published with a view to vilify and defame the prosecutor. The court considered that it was an indispensible averment to state, that the libel was "written of and concerning the prosecutor," or to use some equivalent expression to fin and apply it to him.

[g] The indictment ought to shew a malicious intent in the defendant, but

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It is evidently indeed an insufficient answer to a mischievous clamour, to say that the subject of it was true, and therefore the law either totally disregards such allegation or its contrary. Thus, whether the word, charging the *quo animo* of the publication, be *falso*, or *vere*, makes no difference; the truth or falsehood being no part of the legal nature of the offence. Something, however, of the *quo animo* should be stated, as an adjunct and quality of the action, and therefore serving descriptively to ascertain it.

This is taken, however, as a description of the act and not of the crime.

Our actions are governed by intentions as well as qualified by them; so that, in libel, as in other offences, the intention makes the act more or less criminal.

In setting forth the libel, the indictment may either narrate the exact words, which is technically called, setting it forth, *secundum tenorem sequentem*, in which case the copy must be literal, or it may set it forth in the sense and substance. In the latter case it goes to the court and jury, whether the libel be of such a sense and substance; and as the matter is stated in *genere*, differences in words are of course immaterial.[h]

the word alleging it may be either falsely, maliciously, wrongfully, &c. or any synonymous word. 1 *Saund.* 242. 1 *East.* 563. *Com. Dig.* Action for defamation. *G.* 5.

[h] In setting forth the libel in the declaration, the word *nec* was inserted for *non*. *Holt*, C. J. A libel may be described by the sense or the words; and therefore an information charging that the defendant made a writing, containing such words, is good. And in that case a nice exactness is not required, because it is only a description of the sense and substance of the libel. But in an information, charging the defendant with making a writing, *secundum tenorem sequentem*, there the written libel, and that set forth in the information, must exactly agree, and if any omission makes a word of

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An *innuendo* is an oblique and enigmatical expression of a libellous meaning, referring either to the person libelled, or to some act with which it charges him; it is either a studious or negligent omission, or the expresion of a meaning rendered purposely figurative and equivocal. The law, however, will not suffer these omissions to defeat the end of justice, and to have an uncertainty in law which they have not in their mischief. It suffers therefore these studious or negligent chasms to be supplied according to ordinary intendment, that is to say, what any reasonable man, in reading such, would give them.

The legal purport of an *innuendo* is little more than the grammatical *id est*, *scillicet*, &c. The law, however, whilst it admits the explanation of these chasms by *innuendo*, for the sake of justice, will not suffer them to be so supplied, as to extend and enlarge beyond the antecedent to which they refer.

An *innuendo* is only explanatory of some matter already expressed; it serves to point out where there is precedent matter; but never for a new charge; it may apply what is already expressed; but it cannot add, or enlarge, or change the sense of previous words.

But the nature of averments in libels, the capacity of the *innuendo*, the allegations which are material, and the certainty therein required, both as to statement and

another signification it is fatal; because every word in the information is a mark of description of the very libel itself. 5 *Mod.* 167. *Holt's Rep.* 425. 3 *Salk.* 224. *The Queen* v. *Drake.* The whole of a libel need not be set out in an indictment, but if there be any part which qualifies the rest, it may be given in evidence. 2 *Salk.* 417. 1 *Raym.* 414. But a libel should not be stated to contain matter to the *effect following.* 12 *Mod.* 218.

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proof, are so fully, and at the same time so precisely marked off, in the judgment of Lord Chief Justice De Grey, pronounced in the case of *Rex* v. *Horne*, *Cowp.* 684, that we must refer the reader to it: it is too long for a note.

If a libel be written in a foreign language, it is necessary to set out the original words, and, then, it is usual to translate them.[1]

With respect to the construction of a libel, which is in reality the fact of the crime, it is entirely within the province of a jury. The judge may, and indeed is bound to explain to the jury, in the same manner as he may charge them in any other crime; but the trial, or legal determination of it, as a fact, belongs to the jury; and libel being a crime in law, this interpretation is limited to the principles applied in all cases of penalty. They take words and phrases according to their popular currency; they will not allow a man to have one meaning and his word another; they take words as they do actions, according to their extrinsic and manifest face; and make no reference to intentions, or hypothetical motives, of which they can have no cognisance. There can be no vagueness and uncertainty, and therefore no

[1] Judgment having passed against the defendant for a libel by default, the defendant, after the plaintiff had executed a writ of inquiry, moved in arrest of judgment; because the original paper (an article in the French newspaper, called *Courier de Londres*), as written in the French language, should have been set out in the count. *Per curiam:* that this objection must prevail is evident, from the uniform current of precedents; in all of which the original is set out. The plaintiff should have set out the original words, and then have translated them, shewing their application to him. But the plaintiff had leave to amend the declaration on payment of costs. *Zenobio* v. *Axtell. Hil. Ter.* 35 Geo. III. B. R. 6 *Ter. Rep.* 162.

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danger to personal liberty, by fixing themselves to what is permanent and uniform, namely, the acceptance of words in general usage. The danger would be on the other side, that is to say, if a court or jury deemed it within their duty to chuse arbitrarily any one of the different meanings which a *vox equivoca* would allow.

It may be here necessary to observe, that libels are within the general jurisdiction of the justices of the peace, and are frequently tried at the quarter sessions. This is founded on the statute of 34 Edw. III. c. 1, which enacts that the justices assigned shall have power to restrain offenders, rioters, and all other barrators, and to chastise them according to their trespass or offence.

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CHAP. II.

INFORMATION.

THE next species of criminal remedy for the offence of libel is an information, which is of two kinds:

1st, AN INFORMATION FILED BY THE KING'S CORONER BY LEAVE OF THE COURT, FIRST OBTAINED IN OPEN COURT.

2d, AN INFORMATION FILED BY THE KING'S ATTORNEY OR SOLICITOR-GENERAL, EX OFFICIO.

Informations for libel were frequent at common law; indeed this mode of proceeding is as ancient as any of the remedies of the law. In *Comb.* 141, Lord Holt says, "We cannot impeach the justice of several of our predecessors. Informations were frequent in the time of Lord Hale. The Star-Chamber was an ancient court at common law, and they proceeded by information; therefore so may we."

"The reason," says Lord Holt, "for informations was, that the court of King's Bench cannot take indictments out of the county in which it sits; but the King's Bench has all the lawful power which the Star-Chamber had, and therefore may punish offences committed in other

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counties, which, for the greater part, would go unpunished, if informations for them did not lie in this court." *Holt's Rep.* 861. 1 *W. and M. King* v. *Abraham.*

At common law informations might be filed without motion, in the name of the Master of the Crown Office. By the statute 4 and 5 W. and M. c. 18, they cannot be filed without leave of the court, a check being thus imposed upon frivolous and vexatious suits, and a security for costs, in case of failure, obtained from the prosecutor. Nothing, however, contained in this act extends to any other information than such as is exhibited in the name of the Master of the Crown Office. Thus informations by the Attorney or Solicitor-General *ex officio* are left as at common law.

It is a maxim of the law of England, that no man shall be put to the peril or vexation of the criminal law without an inquest, a presentment, or some record, wherein shall be contained the form and substance of his accusation; which shall be the foundation of all process against him, and that to which he must summon his witnesses, and prepare his defence; —in this manner, serving the purpose both of a commission for the judge to try him, and, in case of conviction or acquittal, being the record of his guilt or innocence.

The nature of an information is, that it supersedes this inquest. It is indeed a kind of prerogative remedy employed by the courts for advancing and facilitating justice. It is of eminent use in this way in many probable circumstances of counties agitated by elections,

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party and popular feuds, &c. in which, from the general contagion of passions and feelings of this kind, it might be difficult to procure the due presentment of a grand jury.

An information, moreover, in many of the minor misdemeanours, is a more prompt and easy remedy than indictment. It saves the delay, the trouble, and inconvenience of calling a grand jury together at unseasonable times. It brings the matter at once, and immediately before the court, and as the question is only interlocutory, as it were, that is to say, whether there be grounds for putting the party upon trial, and not entering into the final merits of the case, there is evidently no confusion of the characters of judge and jury. There is thus no contradiction of any of the essentials of legal trial; and much convenience is gained without any cost or diminution on the part of justice.

If there be any value, as there undoubtedly is, in the double chance, as it is popularly termed, which a defendant has in his two juries, that is to say, in the grand jury which sends him to trial, and the petty jury which tries him, it is difficult to understand how his first chance is impaired by being transferred into the breast of the court. In the first place, it is the character of the court both to understand the rules of evidence better, and more jealously and suspiciously to admit it; and secondly, it is the practice of a grand jury to hear evidence only on one side, whilst the court never grants an information without giving the party against whom it is prayed an opportunity of answering it,

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and, in many cases, of dismissing a conditional rule with costs.

There is still another advantage which informations for misdemeanours have above presentments by grand juries, in the publicity of the application, and of the grounds upon which they are demanded, opposed, and then granted or rejected.

This publicity is surely a sufficient security against any abuse on the part of the court. Add to this, that all the future process of the trial, such as pleading, evidence, &c. is precisely the same as in indictments.

In *Wilkes's Case, Burr.* 2527, Lord Mansfield observes, "that informations neither derived their being, nor their form of proceeding, from the Star Chamber, but from the common law of the land, and the usage, and practice of K. B. where they were exhibited."

In the *King* v. *Robinson*, 1 *Black. Rep.* 542, the same judge observes, "Informations at common law, which were very ancient in this court, were filed by the coroner, who did it upon any application as a matter of course. The statute, therefore, 4 and 5 *William and Mary*, c. 18, was made to limit it. And other grounds there are, by which the court has limited itself,—1st, As to the merits of the person applying;—2d, The time of application;—3d, The suspicious state of the case *ex evidentia rei*;—4th, The consequences of granting the information."

Upon the whole, as the legality of informations, and, more particularly, their agreement with the spirit

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of the constitution, have been lately much questioned, we cannot do better than refer our readers to the celebrated argument of Sir Bartholomew Shower on their antiquity.[k]

2. INFORMATIONS FILED BY THE KING'S ATTORNEY OR SOLICITOR-GENERAL, EX OFFICIO.

Informations of this kind are very frequent for the offence of libel, and the statute of 4 and 5 *W.* and *Mar.* which restricts informations filed by the King's coroner at the suit of the subject, leaves informations *ex officio* upon their ancient ground, that is, as at common law. The object of the information *ex officio* is to meet, with as little interval as possible, those more serious misdemeanours which impede and endanger government, and under which it might not be convenient to wait for the presentment of a grand jury. In a word, they stand, with respect to convenience, and indeed necessity, upon the same general reasons as informations filed by the King's coroner,—that is, they are summary appeals to the court to administer the law, for its own protection, with as little delay as possible. These informations, therefore, are part of the constitution of the country, and are prerogatives of the crown granted for the public defence.

It has been demanded, when the statute of 4 and 5 *W.* and *M.* restricted informations by the coroner to the condition of first obtaining leave in open court, why it

[k] *Mich.* 1 *Will. and Mar. Dominus Rex* v. *Berchet, et al. in B. R.* 1 *Show. Rep.* 106.

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did not extend the same restrictions to informations by the Attorney-General *ex officio*? To this it may be replied, that the main efficacy of the information *ex officio* consisted in the speedy application of the law to any public misdemeanours. It would be contradictory, therefore, to their nature, to subject them to the delay of an application for the rule *nisi*, and the time (however short) which must necessarily elapse before that rule, if obtained, could be made absolute. Add to this, that their ordinary application is to such cases as are manifest offences, and therefore do not admit affidavits of denial, excuse, or extenuation. The King, moreover, and the Attorney-General, his officer, are reputed to be of too high a dignity, and too sound a discretion, to abuse a prerogative granted only for the public peace, and the abuse of which (from the necessary publicity of all subsequent proceedings) must become so manifest, and cannot answer any possible purpose.

It would, moreover, be an inversion of all legal ideas of the King's excellence, to reduce him to the solicitation of leave to file a criminal information from his own court, and to subject him to such a contumacious repetition of the injury, as might be contained in a defensive answer to a rule *nisi*.

With respect to the expence, the advantage is on the side of the subject, as there is evidently less cost, when the information is filed at once, than when there are several steps. In plain words, as these informations of every kind amount to nothing more than the mere bringing of the party to his trial and before a jury, the public convenience and necessity of such speedy process are of infinitely more general good than

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can be counterweighed by the possible, but very improbable, minute injury and vexation, which individuals may sometimes suffer from their abuse.

The granting of an information is not now a matter of course for a libel, but depends upon the sound discretion of the court, according to the particular circumstances of the respective cases that may be brought before them.

It is a general rule, that the court will not grant an information for a private libel charging a particular offence, unless the prosecutor will deny the charge upon oath.[1]

It is an invariable rule not to grant an information for a libel, without an exculpatory affidavit, unless where the party libelled is abroad at a great distance, or the subject matter of the charge is general imputation, or an accusation of criminal language holden in parliament.[m]

[1] A rule had been obtained to shew cause why leave should not be given to file an information against the defendant as the author of a libel, accusing the prosecutor (Mr. Sykes) of having been concerned in a monopoly in the East Indies, which produced a famine, and occasioned the death of 30,000 people.

Upon shewing cause, it was objected, that the prosecutor in the affidavit on which the rule was granted, had not sworn directly and pointedly to his innocence of the charge, which, it was said, was universally required by the practice of the court, before an information will be granted for a libel accusing a private individual of a specific crime.

Lord Mansfield said, this was a general rule, though not universal, for that he recollected some instances where, under particular circumstances, it had been dispensed with, but there was nothing in this case to make it an exception to the general practice. *Doug. Rep.* K. B. 271, *The King v. Miles.*

[m] A rule having been obtained, to shew cause why an information

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In an information for a libel, the court must see that the libellous matter be directly applicable to the party complaining. Implicative and constructive charges will not do: they must be reasonably pointed. *Fitzg.* 57. *Rex* v. *Batchelor.*

should not be filed against Haswell, a printer of a newspaper called the "Morning Post," for a libel inserted in that paper, in the form of queries addressed to the prosecutor, imputing to him a variety of treasonable practices and designs; and accusing him, amongst other things, of having, in his speeches in the house of lords, opposed the increase of the military strength of the kingdom, in order, by preventing such increase, to facilitate a descent in this country by the French: charging him also with having conveyed intelligence to the ministers of France.

And a like rule having been also obtained against Bate, as the publisher.—Lord Mansfield said, there was an objection to which both applications was liable. The prosecutor, in his affidavit, had not specifically denied the particular charges contained in the libel, and this was, in general, expected by the court, before they would interpose by way of information. But his lordship said, it had occurred to him, that the nature of this libel was such, that it might, perhaps, be an exception to the general rule. It contained, besides allegations of particular acts of a very foul and treasonable nature, general charges of treason; and, also, imputations of treasonable language, held by the prosecutor in the debates in the house of lords. That as to what was supposed to have been said by his Grace in parliament, it certainly was unnecessary to answer that by affidavit, because what passes there can be questioned no where else; and general imputations did not seem to fall within the rule which requires a denial of the facts charged. His lordship, however, added, that if there should be any difference of opinion on this subject, the defect, which was only in point of form, might easily be cured by a supplemental affidavit.

Willes, J. said, he did not well see how the court could make any distinction between the prosecutor and the lowest individual. If the rule were general, he thought it ought to be adhered to in this case, and no instance had been stated where it had been dispensed with.

Ashhurst, J. said, he had always understood the rule to be general. If it was, the rank of the prosecutor, however eminent, could make no difference. The court was not to know men, and could only act on what came before them.

Buller, J. observed, that the power of granting informations is discre-

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In all cases where the matter is of consequence and the libel direct, if the necessary forms of denial upon oath be complied with, the information goes as a matter of course, unless a probable cause be shewn to the court that the parties applying for the information

tionary, but he thought there ought, in all such cases, to be certain general rules to guide the court in exercising their discretion. Too much latitude was very dangerous, and the original propriety of a rule was of less im-importance than a strict adherence to it, if it were established. But, as part of this libel contained charges which the Duke certainly was not bound to answer, perhaps it might be proper to grant the rule as prayed, and the prosecutor might make it absolute only as to that part. Lord Mansfield seemed to concur with Buller, justice, in that idea, and Willes, justice, thought the word "false," in the Duke's affidavit, a sufficient denial to ground a rule to shew cause.—The rule was granted.

Afterwards the Duke made an affidavit, expressly denying all the specific charges in the libel, except what related to his conduct in parliament. This affidavit was put in, and was an exact echo (with negative words), of the terms of the libel.

Lord Mansfield, C. J. said, the court had considered the point very fully, and had had a great deal of conversation upon it; and the result was, that the rule was invariable. That it would be extremely dangerous if it were not so.—Dunning read a note of a case of *Rex* v. *Jennison*, in *H.* 13 *Geo. III.* where the libel contained an accusation of an unnatural crime against Lord Arundel; and Lord Mansfield, C. J. and Aston, J. held, that, as the charge was only general, it did not require to be answered by affidavit. *Aston, J.* also said, that it would be extraordinary if it were necessary to deny the charge, when its being true could not justify the defendant. That, if false, it was an abominable calumny; if true, the defendant ought to have preferred an indictment. Lord Mansfield, C. J. then added (as he had stated before) that it had struck him, that the subject matter might make an exception, for it would be absurd, for instance, to require a prosecutor to swear, that he was not a traitor or a thief. He said, the court had looked into the proceedings in the case of Lady Chambers, and it appeared, that there the party applying for the information (who was a third person) had gone as far as the nature of the case permitted, by swearing to letters and intelligence from the Cape of Good Hope, where the scene of the imputed offence was laid, inconsistent with the allegations in the libel.

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are not meant by the libel; or that the defendant did not publish it, or that the charge imports nothing libellous; or that it is stale; or that it is too frivolous for their interference. To deny it is of no signification, for oath stands against oath, and the information goes that the fact may be ascertained. It would be an absurdity, if a man were allowed to justify when an information is prayed against him, and should not be allowed to justify when the information is brought to trial.

The court consider themselves, on application being made for an information, as placed in the room of a grand jury, and will not grant an information, except upon evidence which would support a bill of indictment.[n]

With respect to informations filed *ex officio* by the Attorney-General, they stand peculiarly upon their own grounds.

Lord Mansfield declared, that the court would never grant an information upon the application of the Attorney-General, in cases prosccuted by the crown; because the Attorney-General has a right himself, *ex*

Cause was then shewn, and Lord Mansfield, C. J. (after observing particularly on the affidavits), said, that wherever a strong probable ground is laid, the court will grant an information, if the subject matter be fit for that mode of prosecution: and there never was a fitter subject than the present. The rule was made absolute. *The King* v. *Haswell*, and the *Same* v. *Bate*, on the prosecution of the Duke of Richmond, 1 *Doug.* 387.

Thus in Easter Term, 30 Geo. III. the Duke of Athol having applied for an information against the printer of a newspaper, for a libellous paragraph in his paper, stating that the Duke and his family were held in such general abhorrence in the Isle of Man, that if he should succeed in obtaining an act, then pending in parliament, it would occasion a revolt; the court held that no affidavit from the Duke was necessary.

[n] 6 *T. R.* 294.

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officio, to exhibit one: and he may, if he thinks proper, summon the parties to shew cause "why it should not be exhibited," before he signs it. 4 Geo. III. B. R. 3 *Burr*. 1564.[o]

Neither will the court give the Attorney-General leave to quash an information filed *ex officio;* for he may stop the proceedings upon it by *noli prosequi*, and file another.[p]

[o] *Rex* v. *Phillips* In this case Mr. Attorney-General (De Grey) moved, on the behalf of the crown, for a rule to be made upon the defendant, to shew cause why an information should not be granted against him "for certain misdemeanours in his office as a justice of peace of Plymouth." Lord Mansfield rejected the motion; declaring that he would never grant a rule for an information applied for by the Attorney-General on behalf of the crown: because the Attorney-General has himself power to grant it, if he judges it to be a proper case for an information: and it would be a strange thing for the court to direct their officer to sign an information which the Attorney-General might sign himself, if he thought proper: and if he did not think it a proper case, it would equally be a reason why the court should not intermeddle. If the Attorney-General should have any doubt about the propriety of it, he might send to the magistrate complained against, to shew him cause why he should not grant it. 4 *Burr*. 2089.

[p] An information had been filed, *ex officio*, by the Attorney-General, against the defendants. The defendants had pleaded, and the parties were at issue, and notice of trial given; but the prosecutor countermanded the notice, and the Solicitor-General applied for a rule to shew cause why the information should not be quashed, suggesting as the ground for the application, that another was ready to be filed, which stated the offence more particularly, and was better adapted to the nature of the charge.

Lord Mansfield, C. J. having asked the Solicitor-General if there was any authority or precedent for quashing an information *ex officio* upon the application of the prosecutor, he admitted, that he knew of none; and his Lordship said, that if it was proper to stop the information, he did not see why the Attorney-General might not do it by entering a *noli prosequi*, without the interference of the court.

Buller, J.—What the Solicitor-General has stated, viz. that the pen-

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An information may be filed by the Solicitor-General, while the office of Attorney-General is vacant. *Rex* v. *John Wilkes, Hil. Ter.* 10 *Geo. III.* B. R. 4 *Burr.* 2527.

It may here be necessary to subjoin some few leading examples, in which informations have been granted, or refused by the court.[q]

dency of the first information would be no plea to the second, is decisive against this motion. It is certainly not of course to quash informations: all the litigated cases are upon insufficiency; and if the court has even permitted it in the first instance, it has been because they gave credit to the counsel in stating insufficiency. The rule discharged. *The King* v. *Stratton, et al. Mic. Term.* 20 *Geo. III.* B. R. 1 *Doug.* 239, 240.

[q] On a motion for an information on a libel, in advertising that one Madox, an apothecary, had personated Dr. Crow, a physician, and wrote and took his fee (which the apothecary did not pretend to deny) the chief justice declared, that though truth be no justification of a libel, as it is for defamatory words, yet it will be sufficient cause to prevent the interposition of the court in this extraordinary manner, and induce them to leave it to the ordinary course of justice before a grand jury. *Stra.* 498, *Andr.* 299.

An information for a libel upon the corn factors at Bear-key, denied for the same reason. *Stra.* 498.

Motion for an information against the defendant for publishing a very great reflection upon the African Company in one of the newspapers, by charging them with having supported their trade by treachery and fraud; but as this was only a dispute on the matter of trade, the court thought it would be sufficient to apply to the grand jury. *Mich. Term,* 2 *Geo. II.* 1729. K. B. 90. *The King* v. *Roberts.*

A man advertised in a public newspaper that his wife had eloped from him, and cautioned all persons from trusting her; and an information for a libel being moved for, it was denied, because it was the only way the husband could take to secure himself. The application was against the husband; and *Lee,* C. J. said, the advertisement did not contain any thing criminal in him. *Andr.* 229. *The King* v. *Enes.*

On a rule to shew cause why an information should not go against the defendant for publishing a libel upon one Mr. Hayward, a wine merchant, in the Daily Advertiser; the substance of the advertisement was, "This is

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Though every species and degree of calumny and detraction of this kind are deemed odious in the eye of the law, and punishable either by civil action or criminal prosecution, in most cases at the election of the party injured, yet the court of King's Bench, as we have above observed, whose jurisdiction herein is founded upon the

to give notice, that Mr. Hayward sells wine or brandy by the gallon, quart, or pint; and is to be met with at any hour every afternoon at one of the taverns in Smithfield. N. B. Mr. Hayward sells an excellent salve, made by a relation of his in Dublin, to cure women's breasts with, which may be had at 12*d.* a bottle." The defendant's counsel insisted that this was no libel; but Mr. Fazakerly submitted that it was, by reason that it tended to lessen a man in his trade, and make him ridiculous; however, the court thought it would be going too far to grant an information for such a paper; it was enough to leave the party to his ordinary remedy: accordingly the rule was discharged. *Lee*, C. J. said, "the party was charged with a matter which did not include any guilt." *Andr.* 229.

A writing was directed to general Wills, and the four principal officers of the Guards, to be presented to his Majesty for redress; the paper contained the defendant's case, that he furnished the guard at Whitehall with fire and candle, for which the government owed him 350*l.*; that he obtained a warrant for his money, and captain Carr (the prosecutor) told him, that if he would assign the warrant, he would procure him the money; warrant was assigned, and the money paid to Carr, who refused paying it to the defendant; and the question was, if an information should be granted? and the court held it no libel, but a representation for an injury, drawn up in a proper way for redress, without any intention to asperse the prosecutor; and though there be a suggestion of a fraud, yet that is no more than what is in every bill in chancery, which was never held libellous if relative to the subject matter. *Andr.* 229.

Where the granting the information would be a discouragement to learned inquiries, the court will not listen to the application. Therefore an information was refused, and the party left to his ordinary remedy against a person for publishing in a newspaper, that Ward's pill and drop had done great mischief in twelve different cases, and that they were a compound of poison and antimony, &c. 3 *Bac. Abr.* 492. *The King* v. *Roberts.*

An information lies for a libel in a letter to a mayor, "I am sure you will not be persuaded from doing justice by any little artifices of your town

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necessity of preventing quarrels and ill blood, and which deals with this offence as of dangerous consequence to civil order, and destructive of the peace of the nation, always exercises a discretionary power in granting an information for an offence of this nature, and will, in many cases, leave the party to his ordinary remedy.[r]

clerk, whose consummate malice against me and my family, will make him do any thing be it ever so vile." *Rex* v. *Waite*, 2 *Wils.* 22. It lies for publishing two distinct libels on two distinct persons, by singing two songs at a man's door, one a libel on his son, the other on his daughter, to discredit and disturb him and them. *Rex* v. *Benfield*, 33 *Geo. II.* 2 *Burr.* 980.

And against several persons, who join in one act, as their singing, whether one or two songs, or first and second part, or separate stanzas, it is one entire offence, and they may be joined in one information or indictment. *Rex* v. *Benfield.*

If one of the songs is libellous, and the other not, yet it will only go to lessen punishment, not arrest judgment. *Ibid.*

A party applying for an information, must waive his right of action. But if the court, upon hearing the whole matter, are of opinion that it is a proper subject for an action, they may give the party leave to bring it. *Rex* v. *Sparrows*, 2 T. R. 198.

An informatiou was granted for libelling an ambassador, as in the cases of the *King* v. *D'Eon*, and the *King* v. *Peltier*, already cited in this treatise. He who applies for an information must not have laid behind. *Lofft*, 273.

[r] Thus in a case where the defendant has denied the libel on his oath, as by swearing in an affidavit upon shewing cause against a rule *nisi*, that the subject of charge is true. In this case the court will exercise a discretion; and oath standing against oath, they will refer the party complaining to a grand jury. *Rex* v. *Mitford, Esq.* K. B. E. T. 1814.

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CHAP. III.

ACTION ON THE CASE.

THIS is the next remedy which the law gives, at the suit of the party, to obtain compensation for the injury sustained by malicious defamation. It has been observed, that for every right, and for every injury, done to a man in his person, reputation, and property, the party has a remedy; but this remedy he must take according to the methods laid down, and the rules prescribed by law.

Whenever an act of parliament gives a right, the common law gives a remedy; so where the common law gives a right, or declares an injury, the same law gives a remedy or action; want of right and want of remedy are reciprocal.

It is upon this principle, sanctioned by an uninterrupted usage to be traced from the earliest periods of our law, that an action on the case is given for the injury of written defamation. Actions for scandal are amongst the most ancient in the law.[1] We shall make some observations upon the practical form of this action.

[1] March on slander, p. 5.

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It is usual to commence the declaration, either for a libel or for words, with inducements of the plaintiff's good character, and of his innocence of the crime imputed to him by the defendant; but as these inducements are not traversable they may be omitted,[t] and the declaration may commence with a statement of the defendant's malicous intention to injure the plaintiff. When the libel, or slander, does not affect the plaintiff in his moral character, but merely imputes to him insolvency, or incapacity in the way of his trade, &c. this preface of good character is inapplicable, and the declaration should commence with an inducement respecting the trade.

When the words themselves are such as can only be understood in a criminal sense, as when the plaintiff is directly charged with theft, or perjury, &c. no inducement of any extrinsic matter is necessary; but if, as we have above said, the charge be not necessarily slanderous, the plaintiff, by way of introduction or inducement, should state, that some fact has taken place to which the defendant alludes, and to which the innuendoes must afterwards refer. We have already explained fully the nature of averments and innuendoes, *Rex* v. *Horne*.[u] So, if the libel be actionable only in respect to its affecting the plaintiff in his office, profession, trade, employment, &c. an inducement must be stated, shewing such office, &c. *Com. Dig. Action for Defamation*, G. 3, and 1 *Saund.* 242, *a. n.* 3. But where the libel admits, or imports the fact to exist, no inducement or averment of the fact is necessary. The induce-

[t] 1 Lev. 297.

[u] See likewise *Com. Dig. Action for Defamation*, G. 8, 9.

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ment being material and traversable, time and place should be stated, and in certain cases, a variance might be fatal.[x]

The declaration should allege a malicious intent in the defendant, but it is not necessary to use the word maliciously, for the word falsely, or wrongfully, is sufficient; because, from the want of a probable cause, malice is to be inferred, 1 *Saund.* 242. *Com. Dig. Action for Defamation, G.* 5.[y]

The libel may be set out either in words or substance, 2 *Salk.* 660. If the libel or words are in a foreign language, it must be set forth in the original, as we have already explained in the chapter on Indictment, and though a translation is usual, it is unnecessary, and frequently not adviseable. 1 *Saund.* 242. *n.* 1.

It is unnecessary to enter farther into the technical parts of the declaration of this species of injury: they may be seen fully and correctly stated in the several treatises on pleading. With respect to the damages, a few observations may be necessary.

When the libel is not in itself actionable, and an action is sustainable merely on the grounds of special damage, the declaration would be defective, if such damage were not correctly stated. 1 *Saund.* 243, *n.* 5. But if the libel be actionable, *per se*, the plaintiff may recover,

[x] 4 *T. R.* 590, and *Chitty on Pleading*, Vol. II. p. 456.

[y] The declaration must shew a publication, but the word *published* is not necessary: any equivalent term may supply it. *Vide ante* Chap. I. of this Book, where this point is fully stated. A statement that the defendant published, or caused to be published, is insufficient, but the uncertainty may be aided by the defendant's pleading over. 8 *Mod.* 328. It is necessary, as we have before observed in the case of indictment, to state that the libel was *of and concerning the plaintiff.*

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though no special damage be stated or proved. In either case, however, the plaintiff cannot give evidence of any special damage, unless it be stated in the declaration. *Bull.* N. P. 7. 1 *Saund.* 243, *n.* 5.

The special damage must be the legal and natural consequence of the libel or words spoken, 8 *E. R.* 3; and it should seem, that if the plaintiff might have his action over against a third person, in respect of his refusal to complete a contract, &c. which he had entered into with the plaintiff, the damage is not sufficient. Care, therefore, must be taken in the statement of the damage. 2 *B.* and *P.* 289; 3 *B.* and *P.* 272. The special damage must be particularly specified in the declaration. 1 *Saund.* 243; 8 *T. R.* 130. A loose and general statement of injuries resulting from the slander is not a sufficient allegation to maintain an action for special damages.

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CHAP. IV.

OF THE PLEADINGS.

As every indictment or declaration must contain the legal narrative or description of an offence, the defendant may of course demur, when the matter is either not libellous in contemplation of law, or is defective in any material form of setting it out. But if there be no defect of this kind, the defendant must plead as in other cases of the same kind. The usual pleas to a libel are, *not guilty* upon an indictment or an information; and to an action on the case, in addition to the general issue, may likewise be pleaded a justification.

The plea of not guilty requires the plaintiff, or prosecutor, on his part, to prove all the material allegations, that is to say, the publication, and all such prefatory inducements as are the adjuncts and qualities of the offence as stated in the indictment or declaration. But it does not require him, nor need he prove, the falsity of the words or writing. The general issue does not raise the question of their truth; it rests upon the defendant, in an action, to prove their truth, having first fairly apprised the plaintiff of such being his intention by a plea.

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Under the plea of the general issue, the defendant may prove that he was an innocent publisher; or may give in evidence that the supposed libel is a judicial proceeding;[1] or the copy of a report of the house of commons; that it is the fair narrative of a trial at law; that it has been innocently published, as by reading out of a book; that it was matter of caution to a friend, and without malice in the defendant; that it was admonition or confidential communication; that it was subject of amicable or Christian reproof; that it was the fair use of the defendant's own judgment in the criticism of works of art or literature; that it was the investigation of science; in a word, all such matters of defence may be given in evidence under the general issue, as in reason, and therefore in law, are sufficient vindications. Cases have already been cited in the preceding chapters to these several points: we shall therefore not repeat them. Many of these defences may be specially pleaded; and if the defence be, that the publication was a true report of a trial at law, it ought, perhaps, to be pleaded specially. *Curry* v. *Walter*, 1 *Bos. and Pull.* 523. The defendant may also, on the general issue, prove, in mitigation of damages, such facts and circumstances as shew a ground of suspicion, not amounting to actual proof, of the guilt of the plaintiff. *Earl of Leicester* v. *Walter*, 2 *Camp.* 251.

Something short of the truth, and to shew a probable occasion of speaking or writing defamatory words, may be given in evidence under the general issue.—"So far," says Lord Ellenborough, "I assent to the

[1] But see Chap. XIII. of the last Book, in which these subjects are severally considered, and their extent and limitations marked off.

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case of the *Earl of Leicester* v. *Walter*, and no farther." *King* v. *Perrott*, *H. T.* 1814.

In *Williams* v. *Callender*, 50 *Geo. III.* T. T. K. B. MS. it was holden by the same judge, that "though there was no justification on the record, the defendant might give in evidence somewhat of the real character of the plaintiff, and shew that it was not unblemished and entire. But if he contend that the libel is substantially true, then he must plead a special justification, the proof of which lies upon him."

OF THE JUSTIFICATION OF A LIBEL.

The ground of the action on the case for a libel is the quantum of injurious damage which the person libelled either has, or may be presumed to have sustained, from the libellous matter. It is evident, therefore, that if the subject of the libel, both in its substance and measure, be truly imputed to the plaintiff, that there can be no such injurious damage. The reputation cannot be said to be injured where it was before destroyed. The plaintiff has previously extinguished his own character. He has therefore no basis for an action to recover compensation for loss of character, and its consequential damage. The law considers him as bringing an action of damage to a thing which does not exist. Least of all will it allow such a person *lucrari ex mala fama*,—to make a profit of his bad fame. The law, moreover, has herein a kind of moderate and prudent regard to the interests of society, which are in some degree upholden by the awe and apprehension which bad men entertain of public re-

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proach. Under all these views, therefore, the law, in an action for libel, permits the defending party to justify, by alleging that what he has said is true.

The authorities for the position that the defendant may plead the truth of a libel in justification, are the *dicta* of Hobart, C. J. in *Lake* v. *Hatton*, *Hob. Rep.* 253, and of Holt, C. J. in an anonymous case, 11 *Mod.* 99; but the position is warranted by the general principles of law, as applying to the remedies for civil damages, and the practice at the present day. *I' Anson* v. *Stuart*, 1 *T. R.* 750. All the judges gave their opinion to this effect in parliament, upon questions put to them on the Libel Bill, 1792.

In the case of *King* v. *Parsons*, before Lord Kenyon, 1799, his lordship observed, that it was competent for a defendant in an action for a libel to plead the truth of the supposed libel in justification. And in a late case of *Plunket*, Solicitor-General of Ireland, v. *Cobbett*, tried before Lord Ellenborough, C. J. Middlesex Sittings, 26th May, 1804 (which was an action on the case for a libel, to which the defendant pleaded N. G.), it was observed by Lord Ellenborough, in his direction to the jury, that "in case the libel had been true, it would have been open to the defendant to have justified it on the record." It is worthy of remark, however, that though this doctrine is now considered as established, yet it was not settled even so late as the year 1735; for, in *The King* v. *Roberts*, B. R. *M. T.* 8 *Geo. II. MS.* on a motion for an information against the defendant for a libel, Lord Hardwicke, C. J. thus expressed himself:—"It is said, that if an action were brought, the fact, if true, might be justified; but I think that is a mistake; such a thing was

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never thought of in the case of *Harman* v. *Delaney*, 4 Geo. II. (*Str.* 898). I never heard such a justification in an action for a libel even hinted at. The law is too careful in discountenancing such practices. All the favour that I know truth affords in such a case is, that it may be shewn in mitigation of damages in an action, and of the fine upon an indictment or an information."

In Bacon's Abridgment, Vol. IV. 455, title *Libel*, the same doctrine is laid down, that scandal in writing is not justifiable in a civil action, any more than in an indictment or information.

Information against the defendant for publishing a libel against Mr. Swinton, of Wadham College, Oxon, accusing him of unnatural practices. Lee, C. J. rejected evidence offered of defendant's reasons for the accusation, viz. that the supposed pathic had informed him of them, saying, that the only question was, whether defendant was guilty of publishing the libel. It had been always holden, that the truth of a libel could not be given in evidence by way of justification; because, if the person charged with any crime is guilty, he ought to be proceeded against in a legal course, and not reflected upon in such a manner.*

A justification of a libel, however, in the cases in which it is admitted, must not be pleaded in loose and general terms, but it must affirm the truth of the very point and substance of the imputed slander. The law does not allow pleas of justification, contained in *general* charges of fraud or felony committed by the

* *Bull.* N. P. 9. *Sel.* N. P. 1047.

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plaintiff, because they do not apprise the plaintiff of the defence which is intended to be set up.[b]

In the latter case the action was for a libel, for printing of the plaintiff that he was a swindler; the defendant pleaded, that the plaintiff had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons, with whom he had had dealings and transactions, wherefore he printed, &c. To this there was a special demurrer; and the court of King's Bench was of opinion that the plea was bad, as being too general. The defendant ought to have alleged some particular crime, with the time, place, and the *persons with whom* the plaintiff was supposed to be connected. When the defendant took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge, in order to maintain his plea. And he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life. The defendant could not prove the justification, as he has pleaded it, by general evidence; but he has no justification unless he can prove the special instances, and, knowing them, he ought to put them on the record, that the plaintiff may be prepared to answer them: and they reversed the judgment of the C. P. which had held the plea good.

The justification of a libel must state issuable facts,

[b] *Newman* v. *Bailey*, cited 1 *Ter. Rep.* 750. *l' Anson* v. *Stuart.*

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and the particular acts and offences with which the defendant charges the plaintiff.[c]

In an indictment, however, or an information for a libel, the ground of the legal proceeding is totally different. The basis here is the actual or possible injury to the public peace. Now it evidently makes no difference in the mischief of a libel in this point of view whether the subject alleged be true or false. A bad man is as likely, and indeed more so, to avenge himself than a good man. The truth or falsehood is totally immaterial in the mischief. The law, therefore, as a justification, puts them out of the question. The act itself is a positive crime, and, therefore, like theft, perjury, &c. admits but one simple plea, that of not guilty.

This doctrine is so firmly settled, and so essentially necessary to the maintenance of the King's peace, and the good order of society, that no court of justice has at any time allowed it to be drawn into debate. *5 Coke*, 125; *Hob.* 253; *Hawk.* P. C. c. 73, § 6. It is well observed by Lord Coke, and is indeed derived from the admirable example of the Roman law, that in a settled state of government, the party grieved ought to complain for every injury done to him, in the ordinary course of law, and not to revenge himself by the odious means of libelling or otherwise.[d]

[c] *Holmes* v. *Catesby*, 1 *W. P. T.* 543.

[d] The reader is referred to Chap. III. Book I. for a more full discussion of this most important doctrine in the law of libel. He will there find in what cases a justification can be admitted, and upon what principles, and in what proceedings, it is excluded.

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In indictments, indeed, the word *false* is part of the formal description of the crime. We have shewn it, however, in a preceding chapter, to be merely formal, and not material. It is, in fact, one of those popular adjuncts which, in the simpler times of the law, crept from common discourse into the language of pleading. It has, therefore, been retained: but, like the words, "the instigation of the devil," in an indictment for murder, it is merely surplusage. It is the duty, and has always been the practice of courts of justice, to separate the substance of crimes from their formality, and to require proof only of what is material.

The epithet *false* is not applied to the propositions contained in the libel, but to the aggregate criminal result—the libel. *Falsus libellus* is used in the description of a libel, as *falsus proditor* in high treason; that is to say, wickedly, without *true* cause, or justification. In point of substance, the alteration in the description would hardly be noticeable in law, if, as we have before said, the epithet were *verus* instead of *falsus*.

The law, however, with that prudence with which it qualifies all its general enactments for the public good, has administered an indirect check over any possible mischief which a bad character might effect under this shelter. We have shewn that, upon an application for a criminal information, the party libelled must deny upon oath, if the charge be capable of a distinct negative, the truth of the matter alleged. The court will not assist him without this self-purgation. He must come forward with clean hands. They will not, indeed, as matter of course, permit the defendant, in his an-

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swer to a conditional rule, to justify the truth, but they produce the same effect, by compelling the prosecutor, when it is possible, to swear to the falsehood.

And, in respect to indictments, from the very manner in which an indictment is preferred, *ante corpus comitatus*, by which country it must be presumed the character of the party is sufficiently known, a similar check is administered. Thus we see the law of England stands clear of any immoral countenance of vice, or mischievous diminution of that salutary check upon bad men, public speech and report.

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CHAP. V.

EVIDENCE.

UNDER this head we shall principally examine four questions; first, who shall be deemed the author of a libel? Secondly, what shall be deemed a publication? Thirdly, we shall inquire into the grounds of the responsibility which is cast upon printers, booksellers, and hawkers, so far as they are connected with the dissemination of a libel; and lastly, we shall state the general rules of evidence which apply to the proof of this offence. And, first, we shall inquire of the author of a libel.

1. OF THE AUTHOR.

It has been already observed, that a libel may be expressed, not only by printing or writing, but also by signs or pictures, but one of these modes is essentially necessary. It is laid down in *Lamb's Case*, 9 *Co.* 59, that every person convicted of a libel must be the contriver, the procurer, or the publisher.

But if one writes a copy of a libel and does not publish it to others, it is no publication of the libel.

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But it is strong evidence that he published it, when he, knowing it to be a libel, writes a copy of it, unless afterwards he can prove that he delivered it to a magistrate to examine it; for then the act subsequent explains his intention precedent.

It has been contended, that he who writes a libel dictated by another, is not guilty of the composing and making; because it appears that another is the author or contriver; but herein it has been resolved, that writing being the essential part of a libel, the reducing it into writing, in the first instance, was a making, and differed from the transcribing: and, according to the report of this case, 5 *Mod.* 163 to 167, it was holden, that if one dictates, and another writes, both are guilty of making the libel. But in *Comb.* 406, it is said, that he who dictated cannot be indicted for this libel, because he did not write it, and that, therefore, if the writer could not, the crime would go unpunished. But as all who concur and consent to the doing of an unlawful act are guilty, and as the rules applicable to the offence of libel are the same which apply universally to offences against the criminal law of the land, it should seem, that if one repeats a libel, another writes it down, and a third publishes it abroad, they are all makers of it, and responsible either in civil damage, or criminal punishment.[e]

It is said by Holt, C. J. that where a libel appears under a man's hand-writing, and no other author is known, he is taken with the *manner*, and it turns the proof upon him, and if he cannot produce the composer, it is hard to find that he is not the very man.

[e] See Lord Raym. 418; 5 Mod. 167; Comb. 359, *King* v. *Paine*.

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That the bare copying out of a libel by one who is neither contriver nor composer, is highly criminal. *In all cases where a man does that act which makes a thing to be what it is, he is, and must be construed to be, the doer of that thing.* Therefore he held, that writing a copy of a libel was writing a libel, and if the law were otherwise, men might write copies, and print them with impunity. *Lord Raym.* 417; *Salk.* 417; 12 *Mod.* 220, *Rex* v. *Bear.*[1]

And it is said to have been resolved by the court, that, in libels, making is the genus, composing or contriving is one species, writing a second species, and procuring it to be written a third species. *Lord Raym.* 418.

In this case Mr. Justice Rokeby said, that if *A* invents the matter, *B* makes rhime of it, and *C* writes it, every one, in common understanding, may be distinguished by some special term, but the law denominates them all makers.

It cannot therefore be doubted, but that all concerned in composing, writing, and publishing a libel, are in point of law guilty of a misdemeanour.

We have already shewn in many cases, where the writing and publishing of a libel may be an innocent act; to which examples we may add, that of a clerk who draws an indictment, or a student or reporter who takes a note of it. Here, the circumstances of the act negative that malice, either actual or presumable,

[1] But unless there be a publication, the mere writing or composing a defamatory paper by any man, which is confined to his closet, and neither circulated nor read to others, will not render him responsible either by indictment or action. 5 *Mod.* 167.

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which the law considers as the *gist* of the crime, and it is not done *ad infamiam* of the party; but abstractedly considered, the writing the copy of a libel is writing a libel, because such copy contains all things necessary to the constitution of a libel, namely, the scandalous matter, and the writing. 2 *Salk.* 418; *Lord Raym.* 416.[g]

The most material point established by the above cases is, that writing, being the essence of a libel, the person who appears to have once written a libel, which is *thereafter published*, shall be considered as the maker of it, unless he rebut the presumption of law, by shewing another to be the author, or prove the act to be innocent in him.

It is a sufficient confession that a person is the author of a libel, if, upon being shewn the book, he owns himself to be the author of it, errors of the press excepted.[h]

2. OF THE PUBLICATION.

In order to maintain a civil or criminal proceeding for a libel, it is necessary to shew that it was published.

[g] In an action for a libel, in the shape of an extra judicial affidavit, sworn before a magistrate, a person who acted as the magistrate's clerk, is not bound to answer, whether by the defendant's orders he wrote the affidavit, and delivered it to the magistrate, as he might thereby *criminate himself*. *Maloney* v. *Bartley*, 3 *Camp.* 210.

[h] In an information for a libel against the defendant, the witness, who produced the libel, swore that it was shewn to the defendant, who owned himself the author of that book, errors of the press and some small variations excepted. It was objected that this confession was not absolute. But the Chief Justice said, that he would put it upon the defendant to shew, that there were material variances. *Rex* v. *Hall*, *Strange*, 416.

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Until the publication the act is not complete in its mischief; before it is dispersed abroad it can produce no present or actual injury either to the public or the individual, and, until then, there is a *locus penitentiæ* on the part of those concerned in the composing and writing.

Therefore if a man deliver by mistake a paper out of his study, it is not a publication, though it be a libel. *5 Mod.* 167.

The reading of a libel in the presence of another, without knowing it before to be a libel, with or without malice, does not amount to a publication. *4 Bac. Abr.* 458. Also it is holden, that he who repeats part of a libel in merriment, without any purpose of defamation, is not punishable. But Hawkins says, that the reasonableness of this opinion may justly be questioned, for that jests of this kind are not to be endured, and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it. *Hawk.* P. C. c. 73, § 14. But it seems to be settled, that if he who has either read a libel himself, or has heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or show it to another, he is guilty of an unlawful publication of it. *Hawk.* P. C. c. 73, § 10.

But having a copy of a libel is no publication. *Vin. Abr.* 12, 224. It is said by Lord Coke, in the case *de libellis famosis* to have been resolved, that if one finds a libel, and would keep himself out of danger, if it be composed against a private man, the finder may either burn it, or presently deliver it to a magistrate; but if

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it concern a magistrate, or other public person, the finder *ought* presently to deliver it to a magistrate, to the intent that, by examination and industry, the author may be found out and punished. But it has been justly observed, that the not delivering it to a magistrate was only punishable in the Star-Chamber at the height of its despotism, and that the barely having of a libel in one's custody was no offence.[i] 1 *Vent.* 3: *contra semble*, 2 *Salk.* 418; *Lord Raym.* 417.[k]

Upon the trial the libel must be produced, and before it is read, it must be proved that it was *published* by the defendant, or by others, with his privity.

It is not competent to a defendant charged with having published a libel, to prove that a paper similar to that for the publication of which he is prosecuted, was published on former occasions, by other persons, who have never been prosecuted for it. *Rex* v. *Holt*, 5 *T. R.* 436.

Proof that the libel was contained in a letter directed to the plaintiff, and delivered into the plaintiff's hands, is not sufficient proof of a publication to maintain an action; but an indictment or information will lie.[l]

3. RESPONSIBILITY OF PRINTERS, BOOKSELLERS, &c.

Printing a libel is publishing it. The printer gives a body and activity to the poison, which is mixed up

[i] This dictum of Lord Coke's is almost a literal translation from a passage in the Roman code de famosis libellis. Vide Book I. Chap. I.

[k] 3 Camp. 323.

[l] Vide Book II. Chap. XIII. in which this point is fully considered.

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in private, and would lie in a quiescent state, if no persons could be found to put it into that form which is best suited to give it publicity. Printers and booksellers, therefore, have been justly deemed the instruments of the crime. Whatever be the motive of the printer or publisher, if an injury be done to the public or an individual, he must, and ought, to be answerable for it. The law presumes guilt from every act of public mischief, and imputes a malicious intent to an act which is injurious to another. But facts or circumstances may enhance or mitigate that implied guilt, and vary the degrees of it. Like every other presumption of law, it may be rebutted by contrary proof and shewn to be innocent and accidental.

It is no excuse for the printing or publishing a libel, to say that a man did it in the way of trade, without malice or ill design, or to maintain his family, *St. Trials*, 982.

It is said, that if booksellers or hawkers publish or sell libels, though they know not the contents of them, yet they are punishable: the public peace ought to be more regarded than a private interest. *Wood's Inst.* 445; and whether they publish by their own hands, or their servants, they are equally punishable. An information was moved for against the defendant for selling and publishing a libel. *Objection*:—She was sick, and her servant took the libel into the shop without her knowledge. *Per curiam:* This is no excuse, for a master shall answer for his servant, and the law presumes him to be acquainted with what his servant does. Mr. Justice Fortescue said, that it had been ruled, that the finding a libel on a bookseller's shelf was a publication of it by

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the bookseller. And Lord C. J. Raymond said, it had been ruled, that where a master living out of town, and his trade is carried on by his servant, the master shall be chargeable, if his servant publish a libel in his absence. *2 Sess. Cases*, 33, *pl.* 38. *Rex* v. *Dod*, 10 *G.* 1724.

Indeed, the principle and rule of law seem invariably to have been, that not only he who publishes a libel, but also he who procures another to do it, is guilty of the publication; and it is not material, whether he who disperses a libel knew any thing of the contents or effects of it, or not; for nothing would be more easy than to publish the most virulent slanders with the greatest security, if the concealing of the purport of them from an illiterate publisher would make a man safe in dispersing them.

And, upon this foundation, it has been constantly ruled, as we have in part shewn above, that the buying of a book or paper, containing libellous matter, in a bookseller's shop, is sufficient evidence to charge the master with the publication, although it does not appear that he knew of any such books being in his shop, or what were their contents; and it will not be presumed that it was brought and sold there by a stranger, but the master must, if he suggest any thing of this kind in excuse, prove it. It was so ruled in evidence by *Raym. Ch. Just.* at Guildhall, *Rex* v. *Nut. Fitzg.* 47. This case is cited by Comyn in his *Digest*, title *Libel*, 691, who admits it as a settled rule of law.

In *The King* v. *Almon*,[m] the same docrine was hol-

[m] The defendant having been convicted of publishing a libel (Junius's letter) in one of the magazines called the London Museum, which was

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den by Lord Mansfield; namely, that the buying of a libel in the shop of a known bookseller was sufficient *prima facie* evidence to convict him of publication.

In *Rex* v. *Walter*, it was expressly holden by Lord Kenyon, that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his

bought at his shop, and even professed to be "printed for him;" it was moved for a new trial, upon the ground of the evidence being insufficient to prove any criminal intention in Mr. Almon, or even the least knowledge of their being sold at his shop; and counsel had affidavits to prove, that it was a frequent practice in the trade for one publisher to put another publisher's name to a pamphlet, as printed for that other, when, in fact, it was published for himself. That this was the fact in the present case, Mr. Miller being the real publisher of this *Museum*, but having advertised it, and published it as printed for Mr. Almon, without consulting Mr. Almon, or having his consent or approbation. That, on the contrary, as soon as he saw his name put to it, as being printed for him, he immediately sent a note to Mr. Miller, expressing his disapprobation and dissatisfaction. That he himself had no concern whatever in the London Museum; that he was not at home when the books were sent to his shop; that the whole number sent to his shop was 300; that about sixty-seven of them had been sold there by a boy in the shop, but without Mr. Almon's own knowledge, privity, or approbation; that as soon as he discovered it, he stopt the sale, ordered the remainder to be carried up into his garret, and took the first opportunity to return them to Mr. Miller. That it was not proved that the person who sold them was Mr. Almon's servant, or employed by him, or that Mr. Almon was at all privy to the sale. An affidavit was offered of Mr. Mackworth, one of the jury, who understood Lord Mansfield to have said at the trial, "That this was conclusive evidence;" otherwise, he Mr. Mackworth, was convinced in his own mind, that the defendant ought not be found guilty; and, if he had apprehended that the jury were at liberty to exercise their own judgment, he would have acquitted the defendant. *Per curiam:* A juryman's affidavit, with regard to his sentiments in point of law, at the trial, ought not to be admitted, whatever may be the case of his affidavit tending to rectify a mistake in fact. Lord Mansfield, in reporting the evidence, said, he had told the jury, that there was evidence of the publication, if they believed the witnesses. And he said, he had directed them (as he always had done, and as he took the law to be) that if they were not satisfied that the blanks were filled up in the information in the true

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servant, in the publication of a libel, although it could be shewn that such publication was without the privity of the proprietor.

In this case, the counsel, amongst other things, contended, that *actus non facit reum, nisi sit mens rea;* so that, if the act of publication, which constituted the crime, was proved to be, not the publication of Mr. Walter, but of another, the jury would be bound to acquit the defendant.

Lord Kenyon said, he was clearly of opinion, that the proprietor of a newspaper was answerable criminally, as well as civilly, for the acts of his servants or agents, for misconduct in the conducting of a newspaper. That this was not his opinion only, but that of Lord Hale, Justice Powell, and Mr. Justice Forster; all high law authorities, and to which he subscribed. This was the old and received law for above a century; and was not to be broken in upon by any new doctrine upon libels. The defendant was found *guilty*.

In *The King* v. *Cuthel*, K. B. 1799, the same doctrine

sense and meaning of the writer, they ought to acquit the defendant; and that the epithets used in the information were inferences of law, drawn from the paper itself, and not facts to be proved. And the court were of opinion that none of the matters urged on behalf of the defendant, nor all of them added together, were reasons for granting a new trial, whatever weight they might have in extenuation of his offence, and, in consequence, lessening his punishment; for they were exceedingly clear and unanimous inopinion, that this pamphlet, being bought in the shop of a common known bookseller and publisher, importing by its title-page to be printed for him, is a sufficient *prima facie* evidence of its being published by him; not indeed conclusive, because he might have contradicted it, if the facts would have borne it by contrary evidence; but as he did not offer any evidence to repel it, it must (if believed to be true) stand good till answered, and be considered as conclusive till contradicted. *Rex* v. *Almon, Mich. Term,* 11 Geo. III. B. R. 5 *Burr. Rep.* 2686.

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was holden; and the present noble judge of that court has repeatedly expressed an opinion in conformity with that of his predecessors on the same subject. *King* v. *White*, *M. T.* Guildhall, 1811.[n]

4. OF THE RULES OF EVIDENCE APPLICABLE TO THE PROOF OF THIS OFFENCE.

The criminal intention charged upon the defendant in legal proceedings on libel is generally matter of form; and we have already shewn what the law implies by such imputation. An express criminal intention therefore requires no proof on the part of the prosecutor; and admits no proof on the part of the defendant to rebut it. A man's meaning abstracted from the fact cannot be put in issue.

Upon this subject we shall give an extract from the unanimous opinion of the judges, delivered upon the second reading of the libel bill, upon questions put to them by the house of lords.[p]

"The crime," say their Lordships, "consists in publishing a libel; a criminal intention in the writer is no part of the definition of the crime of libel at the common law." "He who scattereth firebrands, arrows, and death," (which, if not an accurate definition, is a very intelligent description of a libel) is *ea ratione* criminal;

[n] For a more full discussion of this subject, *vide* Chapters III. and IV. Book I. of this work, in which the objections to this doctrine are largely discussed, and, it is presumed, are satisfactorily answered.

[p] This opinion was delivered in the house of lords, April 27, 1792, by the Lord Chief Baron of the Exchequer. It is to be found in Dodsley's Annual Register, 1792.

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it is not incumbent on the prosecutor to prove his intent, and on his part, he shall not be heard to say, "Am I not in sport?" But inasmuch as a criminal intention may conduce to the proof of the publication of all libels; and inasmuch as that criminal intention is of the substance of the crime of libel in some cases by statute; cases may be put where a witness is competent and admissible to prove the criminal intention on the part of the prosecutor; and it may be stated as a general rule, that in all cases where a witness is competent and admissible to prove the criminal intention, a witness will also be competent and admissible to rebut the imputation."

On a trial in an information for a libel, depositions taken before a justice of peace, relating to the fact, the deponent being since dead, were not allowed in evidence by K. B. after advice with the judges of C. P. In cases of felony, such depositions taken before a justice of peace in case the deponent dies, may be used in evidence by statute 1 and 2 *Ph.* and *Mar.* c. 13; but this cannot be extended farther than the particular case of felony. *Salk.* 281; *Comb.* 358, 359.

A libel must be proved to be written in the county laid in the indictment, to convict the defendant of making the libel; all matters of crime being local.[p]

[p] The publisher of a Weekly Register received an anonymous letter, tendering certain information concerning Ireland, and desiring to know to whom the letter should be directed, to which an answer was returned in the Register; after which two letters were received in the same hand-writing, directed as mentioned, and having the Irish post-mark on the envelopes, which two letters were proved to be the hand-writing of the defendant; and the letters themselves contained expressions indicative of the writer's having sent them to the publisher of the Register in Middlesex

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A gazette is evidence of all acts of state; and therefore a gazette, in which it was stated, that certain addresses had been presented to the king from different bodies of subjects, expressing their loyalty, &c. was admitted in evidence to prove an averment in an information for a libel, "that divers addresses had been presented to his Majesty, &c." *The King* v. *Holt*, 5 *T. R.* 436.[q]

In an indictment for a libel, the post-mark of a particular place within the county in which the venue is laid, upon a letter containing the libel, is not sufficient evidence of a publication there by the defendant. But if a libellous letter is sent by the post, addressed to the prosecutor at a place out of the county in which the venue is laid in an indictment for a libel, still if it was first received by him within that county, this is a suffi-

for publication. This was held to be sufficient evidence for the jury to find a publication in Middlesex by the procurement of the defendant. *Rex* v. *Johnson*, 7 *E. R.* 65.

Venue.—The venue in an action for a libel written in one county, and sent into another, cannot be changed into the county where written; for the defendant cannot swear, that the cause of action arose wholly in that county. 1 *T. R.* 571.

But the court will change the venue, in an action for a libel, into a county in which it was both written and published. 3 *T. R.* 306.

So, if written in England, and sent by letter out of the kingdom, it may be changed (from London where it was laid) to the county where it was written. 3 *T. R.* 652.

[q] This point has been much discussed in a late case, in *The King* v. *Sutton*, *Hil. Term.* 56 *G. III.* In which the court of *K. B.* held, that the recital of facts in the preamble of an act of parliament, and the statement of facts in the King's proclamation, were receivable as *prima facie* and general evidence of the truth of those facts, in order to sustain the averments in an information against the defendant for a libel.—*Q.* 3 *Maule and Selwyn's Reports.*

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cient publication by the defendant to support the indictment. *Rex* v. *Watson*, 1 *Camp.* 214.

On the trial of an information for a libel in a newspaper, the defendant has a right to have read in evidence any extract from the same paper connected with the subject of the passage charged as libellous,[r] although disjointed from it by extraneous matter, and printed in a different character. *Rex* v. *Lambert*, 2 *Camp.* 398.

In an action for a libel, after the libel on which the action was brought had been read, the plaintiff's counsel offered in evidence other libels written by the defendant. This having been objected to, on the ground that the plaintiff could not give in evidence any thing which would of itself constitute a ground for a distinct action, Lord Kenyon, C. J. said, he thought that the evidence was admissible, and compared it to actions for slander, in which evidence of other words besides those stated in the declaration were usually received, to shew the malice of the defendant. *Lee* v. *Huson*, *Peake*, N. P. 166.[s]

[r] It cannot be given in evidence, as a bar to an action for a libel (though it is an answer to serious damages), that the plaintiff has been in the habit of libelling the defendant. *Finnerty* v. *Tipper*, 2 *Camp.* 76. *Secus*, *Williams* v. *Faulder*, *coram Lord Kenyon*, 48 *Geo. III.* K. B.

In the former case, Mansfield, C. J. observed, that the evidence did not amount to an absolute defence, but was most essential with respect to the damages.

His lordship added, that if two men are in the habit of publishing monstrous libels against each other daily, there can be no damage on either side.

[s] So in *Rustell* v. *Macquister*, *Middlesex Sittings*, after *H. T.* 1807, 1 *Camp. N. P.* c. 49, n. the plaintiff, having proved the words laid in the declaration, offered evidence of other actionable words spoken by the defendant afterwards: this being objected to, on the ground that these

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In an action on the case for publishing a libel against the defendant, in a paper entitled the Weekly Political Register, a witness was called, who proved that he had purchased one of the papers containing the libel in question before the action was brought; he was then proceeding to prove that he had purchased another copy of the same paper *after* the action was brought. This was objected to on the part of the defendant, on the ground that the publication of the last-mentioned copy might become the subject of a future action, and, therefore, that it ought not to be given in evidence to increase the damages in this action. But Lord Ellenborough, C. J. was of opinion, that, although it was not admissible for the purpose of aggravating the damages, yet it was evidence to shew that the paper was circulated deliberately. *Plunkett* v. *Cobbett*, before Lord Ellenborough, Middlesex Sittings, 26th May, 1804.

latter words might become the subject of a future action, Lord Ellenborough overruled the objection, observing, that evidence might be given of any words as well as any act of the defendant, to shew *quo animo* he spoke the words which were the subject of the action. Still, however, it would be the duty of the judge to tell the jury, that they must give damages for those words only, which were the subject of the action. So per Sir J. Mansfield, in *Finnerty* v. *Tipper*, sittings after *H. T.* 49 *Geo. III.* "In actions for words, it has been allowed to give evidence of words subsequently spoken, for the purpose of shewing that the original words were spoken maliciously and to injure." But see *Mead* v. *Daubigny*, *Peake*, *N. P.* c. 125, where, in an action for slander, Lord Kenyon, C. J. confined this doctrine to words not actionable in themselves; admitting, however, that such words might be given in evidence, although it appeared they were not spoken to the same person to whom the slander was alleged in the declaration to have been spoken. N. This distinction was rejected by Lord Ellenborough in the preceding case of *Rustell* v. *Macquister*, who observed that it was not founded upon any principle. 2 *Camp.* 75. *Carr* v. *Hood*, &c.

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An action upon a libel charging in one count, that the defendant published it as purporting to be a letter from *A* to *B*; and in another, charging generally, that the defendant published the libellous matter, is not sustained by proof of a publication, wherein the defendant stated, that in a debate in the Irish house of commons, several years before, the Attorney-General of Ireland had read such a letter, and then stating the libellous matter *as said by him* in commenting upon that letter; for the characters of the several libels are essentially different, though the slander imputed may be the same.

It seems also, that a libellous assertion, that the plaintiff "*has been for some time past* confined on a charge of high treason," taken as a fact asserted generally by the publisher on his own knowledge, would refer to the period of the publication, and therefore would not be proved by shewing that it was asserted to have been said by another some years before, and consequently referring to the period when it was so said.

Proof of a warrant to arrest *on suspicion of high treason*, will not sustain a justification that the plaintiff was arrested and confined *on a charge of high treason*. *Bell* v. *Byrne*, 13 *E. R.* 554.

The proceedings against the printers, publishers, and proprietors of newspapers, either civilly or criminally, for any libel contained in such papers, are much facilitated by a modern statute, 38 *Geo. III.* c. 78, by which it is enacted, "that no person shall print or publish any newspaper, until an affidavit (or affirmation, in case of a Quaker) shall have been delivered at the stamp-

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office, setting forth the real and true names, additions, descriptions, and places of abode, of the printer, publisher, and of all the proprietors, if they do not exceed two, exclusively of printer and publisher; if they do, then of two such proprietors, exclusively of printer and publisher, specifying the amount of shares, the true description of the building wherein such paper is intended to be printed, and the title of such paper. If the proprietors exceed two, then two whose proportional shares in the property shall not be less than the proportional share of any other proprietor, exclusively of printer and publisher, shall be named and described in the affidavit or affirmation. This affidavit or affirmation must be renewed as often as the printer, &c. shall change his abode or printing-office, or as often as commissioners for stamp duties shall require. It must be signed by the parties making it, and taken by a commissioner or person specially appointed by commisioners. It must be sworn by all the parties if they do not exceed four; if they do, then by four, who shall give notice to the other parties not swearing, under a penalty of 50*l.* Such affidavits or affirmations shall be filed, and the same, or certified copies thereof, shall, in all proceedings civil and criminal, touching any newspaper therein-mentioned, be received as conclusive evidence of the truth of the matters contained in such affidavit against the persons swearing, and against proprietors named but not sworn, unless such persons shall have delivered to the commissioners, previously to the date of the newspaper in question, an affidavit or affirmation of their having ceased to be printers, &c. of such paper; and by the 11th section it is enacted, that after such

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affidavit shall be produced in evidence against the person signing the same, &c. and after a newspaper shall be produced in evidence, entitled in the same manner as the newspaper mentioned in such affidavit; and wherein the name of the printer and publisher, and place of printing, shall be the same, it shall not be necessary for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to prove that the newspaper to which such trial relates, was purchased at any house, &c. belonging to or occupied by the defendants or their servant, &c. or where they usually carry on the business of printing and publishing such paper, or where the same is usually sold."

The affidavit, together with the production of a newspaper corresponding in every respect with the description of it in the affidavit, is not only evidence of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be. *Rex* v. *Hart*, 10 *East*, 94.

By the 13th section, certified copies of such affidavits, &c. shall be delivered by commissioners, or proper officer, on payment of one shilling. A copy of such affidavit, &c. certified to be a true copy, under the hand of commissioners, or proper officer, shall, on proof of handwriting only, without proving the persons signing to be a commissioner or officer, be proof of the swearing, or affirmation and contents, and that it has been sworn or affirmed according to the statute. Every printer or publisher must, within six days after publication, deliver a copy of his paper, signed by himself, or his publisner,

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with his name and place of abode, to a commissioner or other officer, and any person may apply for and shall obtain the same at any time within two years from the day of publication (on giving surety to return it), for the purpose of producing it in evidence in any proceeding civil or criminal.[1]

The different office of the court and jury, on the trial of an indictment or an information for a libel, was once the subject of much unpleasant and indecorous contention in the courts, and perhaps of some legal uncertainty. It had been often holden by Lord Mansfield and the court, particularly in the case of *The King* v. *the Dean of St. Asaph*, 3 *T. R.* 428, that the only questions for the consideration of the jury were, the fact of publishing, and the truth of the *innuendoes;* whether the subject matter were or were not a libel was deemed a question of law for the consideration of the court. In the cases which came before Lord Kenyon the same doctrine was admitted. Indeed, the unanimous opinion of the judges to which we have referred, upon questions put to them by the house of lords upon the nature of the law of libels, was in unison with the former sentiments of Lord Mansfield and the court of K. B.

The libel act, however, became law; and by this act

[1] Before this statute, it had been holden, in the case of *R.* v. *Topham, H.* 31 Geo. III. B. R. 4 *T. R.* 126, where the defendant was indicted for having published in a newspaper a libel reflecting on the memory of a dead person, that evidence that the paper had been sold at the office of the defendant; that the defendant, as proprietor of the paper, had given a bond to the stamp office, pursuant to stat. 29. Geo. III. c. 50, § 10, for securing the duties on the advertisements, and that he had from time to time applied to the stamp office, respecting the duties on the paper, was evidence to be left to the jury, to shew that the defendant was the publisher.

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tranquillity was established in the courts on this much agitated point.

That statute has been often deemed declaratory only of the common law. It affects, indeed, merely to declare it in terms—It DECLARES and enacts, " That in an indictment or information for a libel, where issue is joined on *not guilty,* the jurors may give a general verdict on the matter, and the judge shall not require them to find the defendant guilty, merely on the proof of publishing, and on the sense ascribed to the supposed libel in such complaint or information." 32 Geo. III. c. 60.

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CHAP. VI.

OF THE JUDGMENT.

In case of a verdict against the defendant in an action at the suit of an individual, the judgment, and subsequent proceedings, are as in other personal actions. Upon a conviction on a criminal proceeding, the defendant is generally brought up for judgment early in the ensuing term; and, upon the conviction, a fresh recognisance is generally required, to secure his personal appearance to receive the sentence of the court.

In the mean time, within the usual interval, he may move for a new trial, upon any of those grounds of objections which go either to the essential merits of the case or the regularity of the proceedings. If there be any thing substantially defective on the record; if there be, in law, no libel, or no sufficient averment of it in the indictment, the defendant may move the court in arrest of judgment. He may likewise, in libel, as in other cases, bring his writ of error; but, as writs of error are too frequently brought for frivolous reasons, the court will not suffer him to continue upon bail, or delay to pass their sentence, until the merits of his writ of error shall be determined. This is the proceeding in all misdemeanours.

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When the defendant is brought up for the judgment of the court he is permitted to produce affidavits in extenuation of his offence; to inform the court of the real state of his case, and thereby mitigate the punishment of his crime. He may shew that he has acted under error, irritation, and the impulse of momentary anger. He may supply by his own affidavit, or that of others, facts and circumstances necessary to exhibit the case in its proper colours; he may produce affidavits to his good character, with a view of shewing that the offence of which he has been found guilty is not of a piece with his ordinary habits of life. In these cases, the value of repuation is always seen, and the court never fail to advert to it in the judgment they pronounce.

But he is not permitted, under the cover of this indulgence, to defeat the purposes of justice. He must not abuse the indulgence of the court, and repeat his crime in his defence. He must not again libel the prosecutor in his affidavits, nor produce any matter which vilifies the court, jury, or parties concerned. Least of all, is he permitted to justify, and affirm the truth and innocence of that which the verdict has already pronounced to be criminal.*

* A defendant convicted on a criminal prosecution cannot move for a new trial after the first four days of the next term; though, if it appear to the court at any time before judgment, that injustice has been done by the verdict, they will interpose and grant a new trial. *The King* v. *Holt*, *Mich. Term*, 34 Geo. III. *E. R.* 436.

When a defendant, who has suffered judgment by default in a criminal prosecution, is brought up for judgment, each party should come prepared with affidavits disclosing his own case (if he mean to produce any affidavits at all); but if, in the course of the inquiry, the court wish to

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Some of the ordinary rules in respect to these proceedings are given in the note below. *The King* v. *Finnerty*, *H. T.* K. B. 1811.

have any point further explained, they will give the defendant an opportunity of answering it on a future day. *Rex* v. *Wilson*, 4 *Term Rep.* 487.

When a defendant, who has been convicted on an indictment, comes up to receive judgment, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial, which affidavits the defendant is at liberty to answer. *The King* v. *Sharpness*, 1 *T. R.* 228.

Where a defendant is brought up for sentence on an indictment or information, after verdict, the defendant's affidavits shall be first read, and then those of the prosecution; after which the defendant's counsel shall be heard, and, lastly, the counsel for the prosecution. *R.* v. *Bunts*, *Reg. Gen. M.* 29 Geo. III. *Rex* v. *Finnerty*, *H. T.* K. B. 1811. Where a defendant is brought up for judgment by default, the prosecutor's affidavits shall be first read, then the defendant's, after which the counsel for the prosecution shall be heard; and lastly, the defendant's counsel. But if no affidavits be produced, the defendant's counsel shall be heard first, and then the counsel for the prosecution. *Q. T. R.* 689, *and* 683. *sed quære* the practice in the latter case. After conviction on a criminal information, to which objections were taken, the defendant must stand committed pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out on bail. *Rex* v. *Weddington*, 1 *East. Rep.* 143.

After judgment on the defendant for a libel, the court refused to make an order on the prosecutor to deposit the original libellous papers with the officers of the court.

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CHAP. VII.

PUNISHMENT.

In respect to actions on the case for libels, the punishment is in the damages, which are levied as in other personal actions.

In criminal proceedings, the punishment is different in kind and degree according to the merits of the case. The two chief divisions may be said to be, punishments without infamy, and punishments with infamy. Those with infamy, are such as have pillory, whipping, loss of ears, branding, and burning of the subject matter by the common hangman, attached to fine and imprisonment. Those without infamy, are fine and imprisonment, or either of them

It may be here necessary to observe, that the court of King's Bench, as the sovereign criminal tribunal, and having the universal peace of the kingdom under its keeping—having no locality, but according to the form of its original constitution, following the royal person wherever he may choose to lead it, has authority to imprison offenders in any part of England. The court employ this, their undoubted and inherent right, as an instrument of leniency, or severity.

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We have thus endeavoured to mark out the compass and general limits of the English law of libel, and to make it appear, as far as in our power lay, that this branch of the law of England contains nothing contradictory to the spirit of the constitution, but is, in every respect, in perfect conformity with the general criminal law of the country. It is unnecessary to say more, than that it is an analagous part of a system, which, beyond any other code of laws in the civilized world, secures the interests of government and establishments at the least possible cost of personal restriction; and is thus a practical example of what has always been considered as the characteristic of a good and free government, that of uniting the peace, order, and union of civilized life, with the greatest possible portion of the independent exercise and enjoyment of our natural faculties.

THE END.

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